91-1613

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest **COHN**, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. **BOND**, M.D., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BEVERLY C. MOORE, JR.
(Counsel of Record)
SANDRA B. BRANTLEY
Moore & Brown
4900 Massachusetts Ave., N.W.
Suite 230
Washington, D.C. 20016
(202) 364-1032

B. ERVIN BROWN, II
Moore & Brown
240 Branch Bank & Trust Bldg.
8 West Third Street
Winston-Salem, N. Carolina 27101
(919) 723-7966

Counsel for Petitioner

CASILLAS PRESS, 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTIONS PRESENTED FOR REVIEW

1. Whether the private medical doctor ("M.D.") credentialing staff of a state-chartered municipal hospital, who combined to exclude competing chiropractors from hospital privileges in violation of Sherman Act §§ 1 & 2 and Clayton Act § 16, are immune from antitrust liability under the Local Government Antitrust Act and/or the state action doctrine of *Parker v. Brown*, where the relevant "clearly articulated state policy" set forth in North Carolina statutes expressly *permits chiropractors to practice in public hospitals* (and *requires* chiropractor admittance upon the request of a hospital patient), but where the Court of Appeals' antitrust immunity analysis completely ignored the North Carolina Chiropractor Hospital Access Statutes and instead relied upon an irrelevant state statute (not even applicable to chiropractors) which only authorizes public hospitals to grant or deny privileges to M.D.'s, dentists, and podiatrists.

2. Whether the doctrine of intracorporate immunity (*see Copperweld Corp. v. Independence Tube Corp.*) may be extended to insulate from antitrust liability all hospital M.D. credentialing staff members who as independent economic entities privately conspire to exclude from hospital privileges an entire class of directly competing and lower cost non-M.D. health providers (i.e., chiropractors, nurse midwifes, etc.), under the theory that such private M.D. competitors

are acting merely as "employees" or "agents" of the hospital.

PARTIES TO THE PROCEEDING

Petitioner R. Ernest Cohn, D.C., D.A.B.C.O., the plaintiff in the District Court and appellant in the Court of Appeals, is a licensed chiropractor who maintains a practice in Wilkesboro (Wilkes County), N.C. Petitioner is not a corporation (*see* Rule 28.1).

Respondents, the defendants in the District Court and appellees in the Court of Appeals, are John L. Bond, M.D., John Bennett, M.D., Larry S. Kilby, M.D., Karolen C. Bowman, M.D., Donald D. Peterson, M.D., Kirk D. Gulden, M.D., John G. Oliver, M.D., James K. Hartye, M.D., Thomas K. McMahan, M.D., Leonard R. Baugham, M.D., Mark D. Andrews, MD., J. Thomas Bowman, M.D., Duane H. Smith, M.D., and Jerry F. Watson, M.D. During the relevant period respondents were medical doctors engaged in private for-profit practice in Wilkes County, N.C. and were at various times members of the staff Credentials and/or Executive Committees of Wilkes General Hospital, a municipal hospital chartered under the laws of North Carolina and the only hospital located in Wilkes County. Respondent Bond also served on the Wilkes Board of Trustees.

Other Board members and the Hospital were originally named but were dropped as co-defendants in the District Court after this Court's decision in *Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 14

I. The Fourth Circuit's Decision Creates a Clear Conflict among the Circuits by Extending "State Action" Antitrust Immunity from Anticompetitive Activities Contemplated by a "Clearly Articulated State Policy" to those Expressly Prohibited by the Relevant State Statute 14

II. By Its Radical Expansion of the Intracorporate Conspiracy Doctrine as an Antitrust Defense, the Fourth Circuit's Decision is in Direct Conflict with those of all Other Circuits and this Court 18

III. Exclusionary and Anticompetitive Practices in the Health Care Industry Raise an Important Issue of Public Policy which the Antitrust Laws Should Address 24

CONCLUSION 27

APPENDIX A (4th Cir. Op.) 1a

APPENDIX B (Dist. Ct. Op.) 15a

APPENDIX C (4th Cir. Rehearing Denial) 25a

TABLE OF AUTHORITIES

Cases ***Page***

Bloom v. Hennepin County, 783 F. Supp. (D. Minn. 1992) 16

Bolt v. Halifax Hospital Medical Center, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990) 7n.5, 18n.10

Bolt v. Halifax Hospital Medical Center, 851 F.2d 1273 (11th Cir. 1988) 21n.11

Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985) 23n.13

Capital Freight Services, Inc. v. Trailer Marine Transport Corp., 704 F. Supp. 1190 (S.D.N.Y. 1989) 14

Cincinnati Riverfront Coliseum, Inc. v. Cincinnati, 556 F. Supp. 664 (S.D. Ohio 1983) 16

Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hospital, 795 F. 2d 340 (4th Cir. 1986) 8n.6, 17

Cohn v. Bond, 953 F.2d 154 (4th Cir. 1991) ..... *passim*

Cohn v. Wilkes General Hospital, 127 F.R.D. 117 (W.D.N.C. 1989) 13n.7

Cohn v. Wilkes General Hospital, 767 F. Supp. 111 (W.D.N.C. 1991) 1

Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991) 15, 21n.11

Community Communications Co. v. Boulder, 455 U.S. 40 (1982) 15

Cooper v. Forsyth County Hospital Authority, 789 F.2d 278 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986) 18n.10

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 11, 23

Dorsten v. Lapeer County General Hospital, 88 F.R.D. 583 (E.D. Mich. 1980) 13n.7

Feminist Women's Health Center, Inc. v. Mohammed, M.D., 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) 13n.7

Griffith v. Health Care Authority of City of Huntsville, 705 F. Supp. 1489 (N.D. Ala. 1989) 17n.8

Hart Productions, Inc. v. Greater Cincinnati Convention and Visitors Bureau, 1990-2 Trade Cas. (CCH) ¶ 69,233 (S.D. Ohio) 16

In re Domestic Air Transportation Antitrust Litigation, 137 F.R.D. 677 (N.D. Ga. 1991) 24n.14

Jiricko v. Coffeyville Memorial Hospital Medical Center, 700 F. Supp. 1559 (D. Kan. 1988) 13n.7

Lancaster Community Hospital v. Antelope Valley Hospital Dist., 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168 (1992) 15

Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981) 13n.7

Nanavanti v. Burdette Tomlin Memorial Hospital, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) 19, 21n.11

New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802 (S.D.N.Y. 1986) 16

Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605 (6th Cir. 1990), *modified on reh'g*, 927 F.2d 904, *cert. denied*, 112 S. Ct. 406 (1991) 19, 20n.11

Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 973 (1992) ..... *passim*

Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988) 18n.10, 21n.11, 22

Ott v. St. Luke Hospital of Campbell County, 522 F. Supp. 706 (E.D. Ky. 1981) 13n.7

Parker v. Brown, 317 U.S. 341 (1943) 10, 14

Pinkard v. Johnson, 118 F.R.D. 517 (M.D. Ala. 1987) 13n.7

Pudlo v. Adamski, 1992-1 Trade Cas. (CCH) ¶ 69,764 (N.D. Ill.) 18n.10, 21n. 11

Quinn v. Kent General Hospital, 617 F. Supp. 1226 (D. Del. 1985) 13n.7

Robinson v. Magovern, 83 F.R.D. 79 (W.D. Pa. 1979) 13n.7

Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital, 853 F. 2d 1139 (4th Cir. 1988) 8n.6

Schafer v. Parkview Memorial Hospital, Inc., 593 F. Supp. 61 (W.D. Ind. 1984) 13n.7

Scott v. Township of Bristol, 1990 U.S. Dist. Lexis 15313 (E.D. Pa.) 23n.13

Summit Health Ltd. v. Pinhas, 111 S. Ct. 1842 (1991) 13n.7, 18-19n.10

Sweeney v. Athens Regional Medical Center, 709 F. Supp. 1563 (M.D. Ga. 1989) 16n.8

Tambone v. Memorial Hospital for McHenry County, Inc., 825 F.2d 1132 (7th Cir. 1987) 13n.7

Todorov v. DCH Healthcare Authority, 921 F.2d 1438 (11th Cir. 1991) 18n.10

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 15, 22n.13

Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985), *vacated & remanded on other grounds*, 475 U.S. 1105 (1986) 23n.13

Wall v. City of Athens, 663 F. Supp. 747 (M.D. Ga. 1987) 16

Wei v. Bodner, 127 F.R.D. 91 (D.N.J. 1989) 13n.7

Weiss v. York Hospital, 745 F.2d 786 (3d Cir. 1984), *cert. denied sub nom. Medical and Dental Staff v. Weiss*, 470 U.S. 1060 (1985) 18n.10, 21n.11

White v. Rockingham Radiologists, Ltd., 820 F.2d 98 (4th Cir. 1987) 22n.12

Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *on remand*, 671 F. Supp. 671 (N.D. Ill. 1987), *aff'd*, 895

F.2d 322 (7th Cir. 1990), *cert. denied*, 111 U.S. 513 (1990) 3, 22

Statutes and Rules

28 U.S.C. §1254(1) 2

Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2 .... 2, 12, 18

Clayton Act § 16, 15 U.S.C. § 26 2

Local Government Antitrust Act, 15 U.S.C. § 36 ..... 3, 14

Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq* 13n.7

42 U.S.C. § 1861(s) 6n.4

42 C.F.R. § 410.22(b)(2) 6n.4

N.C. Gen. Stats. § 90-153 ..... *passim*

N.C. Gen. Stats. §90-157.1 ..... *passim*

N.C. Gen. Stats. § 131E-5 ..... 17n.9

N.C. Gen. Stats. § 131E-7(a)(6) 17n.9

N.C. Gen. Stats. § 131E-85(a) 7, 11, 15

N.C. Gen. Stats. § 131E-86(a) 5n.4

Miscellaneous

Havighurst, "Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships," 1984 *Duke L.J.* 1071 ..... 5n.3

Meade *et al.*, "Low Back Pain of Mechanical Origin: Randomized Comparison of Chiropractic and Hospital Outpatient Treatment," 300 *British Med. J.* 1430 (1990) 4n.2

Richards, "Nonphysician Practitioners Make Slow Headway on Staff Privileges," 58 *J. Am. Hosp. Ass'n* 82 (1984) 24n.15

Rule, Asst. Attorney General, Justice Dept., Antitrust Division, Speech Before the American Medical Ass'n, Dec. 6, 1988 ..... 26n.16

Shekelle, *et al.*, *The Appropriateness of Spinal Manipulation for Low-Back Pain* (Rand Corp. 1991) 4n.2

Waagen *et al.*, "A Prospective Comparative Trial of General Practice Medical Care, Chiropractic Manipulative Therapy and Sham Manipulation in the Management of Patients with Chronic or Repetitive Low Back Pain," Conf. Materials Submitted at Meeting of Int'l Society for the Study of

the Lumbar Spine, June 13-17, 1990, Boston, Mass.....4n.2

Oliver Promises FTC Will Fight For More Competition in Health Care Area, Antitrust & Trade Reg. Rep. (BNA), No. 1301 at 211 (Feb. 5, 1987)..... 26n.16

NHLA Conferees Probe Pitfalls Facing Health Care Providers, Antitrust & Trade Reg. Rep. (BNA), No. 1401 at 171 (Feb. 2, 1989) 26n.16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest COHN, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. BOND, M.D., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals (App. A, *infra* at 1a-13a) is reported as *Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991). The opinion and judgment of the District Court, *Cohn v. Wilkes General Hospital*, 767 F. Supp. 111 (W.D.N.C. 1991), is reproduced in App. B, *infra* at 14a-24a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1991, and reaffirmed by the denial of

a timely filed petition for rehearing with suggestion for rehearing *en banc* on February 10, 1992 (25a-26a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AT ISSUE

The Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2, provide:

> (1) Every contract, combination ..., or conspiracy in restraint of trade or commerce among the several states ... is declared to be illegal", and
>
> (2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire ... to monopolize ... shall be deemed guilty of a felony.[1]

The Clayton Act § 16, 15 U.S.C. § 26, provides:

> Any person ... shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws....

---

[1]The Clayton Act, 15 U.S.C. § 15(a), creates a private civil damage cause of action for violations of Sherman Act §§ 1 or 2.

The Local Government Antitrust Act, 15 U.S.C. § 36(a), provides:

> No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act ... in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

STATEMENT OF THE CASE

Chiropractors are a group of health practitioners who treat certain musculoskeletal disorders, principally lower back pain (one of the most common physical ailments in this country, afflicting at least one in seven Americans annually), through a method known as "spinal manipulation". Chiropractors have their own educational and training institutions and state licensing requirements, which are separate from those of medical doctors ("M.D.s"). However, M.D.s (e.g., orthopedists, neurosurgeons, family practitioners) also treat musculoskeletal disorders, including lower back pain, and in doing so substantially compete with chiropractors.

M.D.s through their American Medical Association have been found to have conspired for decades to boycott the competing chiropractic profession, in violation of the antitrust laws. *Wilk v. American*

Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *on remand*, 671 F. Supp. 671 (N.D. Ill. 1987), *aff'd*, 895 F.2d 322 (7th Cir. 1990), *cert. denied*, 111 U.S. 513 (1990). A significant and growing body of scientific evidence now suggests that chiropractic treatment of certain types of lower back pain may be as or more efficacious, involving reduced expense and shorter hospital stays, than M.D. treatment,[2] potentially saving billions of dollars per year in health costs.

Encouraged by the growing evidence of efficacy and the favorable initial Seventh Circuit decision in *Wilk*, petitioner, a licensed chiropractor practicing in Wilkes County, North Carolina, applied for in-patient and/or out-patient privileges at Wilkes General Hospital ("Wilkes" or the "Hospital") on several occasions between 1984 and 1988. Wilkes, a state-chartered "public" or "municipal" facility, is the only hospital

---

[2]Recent studies include Meade *et al.*, "Low Back Pain of Mechanical Origin: Randomized Comparison of Chiropractic and Hospital Outpatient Treatment," 300 *British Med. J.* 1430 (1990); Waagen *et al.*, "A Prospective Comparative Trial of General Practice Medical Care, Chiropractic Manipulative Therapy and Sham Manipulation in the Management of Patients with Chronic or Repetitive Low Back Pain," Conf. Materials Submitted at Meeting of Int'l Society for the Study of the Lumbar Spine, June 13-17, 1990, Boston, Mass. ("both family practice and chiropractic care have the ability to reduce impairment and the expression of pain in patients with chronic and recurrent low back pain. However, only chiropractic manipulative care showed significant improvement when compared with a control sham manipulation group."); Shekelle, *et al.*, *The Appropriateness of Spinal Manipulation for Low-Back Pain* (Rand Corp. 1991).

located in Wilkes County, which was never disputed as the relevant geographic market for antitrust purposes.

Petitioner's application was referred, pursuant to the Wilkes bylaws, to the medical staff Credentials and Executive Committees. As in the typical hospital, these Committees consisted of various physicians, all of them M.D.s, who maintained private for-profit medical practices in the vicinity and had already obtained hospital admitting privileges for their own patients.[3] These Committee members included the respondents, virtually all of whom competed with petitioner and other chiropractors in diagnosing, treating, and/or referring patients with musculoskeletal disorders.

Utilizing their memberships on these staff M.D. Committees, respondents conspired or combined to deny petitioner any of the requested hospital privileges.[4] Understanding that the Wilkes Board of

---

[3]*See generally* Havighurst, "Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships," 1984 *Duke L.J.* 1071.

[4]In applying for in-hospital privileges (e.g., manipulation under sedation, intersegmental traction, bed rest, emergency room treatment of accident victims), petitioner understood that his patients would have to be co-admitted by a staff M.D. who would be responsible for any medical (not chiropractic) needs of the patient. N.C. Gen. Stats. § 131E-86(a). In applying for out-patient privileges (x-rays, lab tests, physical therapy), petitioner did not seek to treat his patients in the hospital but to have them utilize existing hospital facilities, particularly the radiology department. Over the years petitioner had lost hundreds of Medicare patients (and hundreds of thousands of dollars in revenue) who could not afford or were unwilling to pay for their own x-rays. Medicare reimburses for such chiropractic treatment, but only if an M.D. or Osteopath agrees to perform an x-ray and confirms that a subluxation exists (for which the

(footnote continued on next page)

Trustees relied upon and routinely ratified their medical judgments regarding hospital privileges, respondents concocted and forwarded to the Board a series of sham pretexts as to why admission of *any* chiropractor (not just petitioner personally) would "lower the quality of patient care" at the hospital—the same basic rationale found in *Wilk* to be unsupported by the scientific/medical evidence.[5] The Board's

---

(footnote continued from previous page)
M.D radiologist can be directly reimbursed by Medicare). A chiropractor such as petitioner cannot be reimbursed by Medicare for his own x-rays. *See* 42 U.S.C. § 1861(s) and 42 C.F.R. § 410.22(b)(2). The Wilkes radiology department (respondent Bennett, M.D.) refused to perform and interpret x-rays for petitioner's patients because he lacked out-patient privileges. His application for out-patient privileges was denied because he lacked in-patient privileges. Consequently, many of petitioners' potential patients suffering from lower back pain instead went to M.D.s for treatment, because all of those costs, including x-rays, would be covered by Medicare.

[5]Respondents claimed that the quality of patient care would deteriorate because (1) the M.D.s and other hospital staff, being unfamiliar with the tenets of chiropractic, would be unable to monitor petitioner's work (though since *Wilk* dozens of other hospitals have admitted chiropractors without incident), (2) despite the North Carolina Chiropractor Hospital Access statutes (*see infra* at 9-10), Wilkes General should not have to be the *first* North Carolina hospital to admit a chiropractor, (3) the Hospital might incur malpractice liabilities (though petitioner had his own ample malpractice insurance), (4) the Hospital might receive complaints from patients about chiropractor "billing practices" with which the Hospital was unfamiliar (though most chiropractic care, like ordinary medical care, is paid for by health insurance companies), (5) petitioner might not agree to abide by statutory co-admitting requirements (simply not true), and (6) no member of the Hospital Board of Trustees had *personally* received a request that the Hospital provide chiropractic services. Petitioner was prepared to

(footnote continued on next page)

ratification of this adverse recommendation represented the first time in its Chairman's 13 year tenure that any Hospital privileges applicant had been rejected.

This elaborate sham became necessary when, during their deliberations, the respondents learned to their surprise and consternation that state law did not make it so easy for public hospitals to deny chiropractors privileges. State law gave public hospitals virtually unfettered discretion to grant or deny privileges to M.D.s, dentists, and podiatrists. N.C. Gen. Stats. § 131E-85(a) provided:

> The granting or denial of privileges to practice in hospitals to *physicians* licensed under Chapter 90 of the General Statutes, Article 1 [i.e., M.D.s], *dentists* and *podiatrists* and the scope and delineation of such privileges shall be determined by the governing body of the hospital. Such determinations shall be based upon the applicant's education, training, experience, demonstrated competence and ability, and judgment and character of the applicant, and the reasonable objectives and regulations of the hospital, including,

---

(footnote continued from previous page)
demonstrate with evidence that each of these were sham pretexts. *Compare Bolt v. Halifax Hosp. Med. Center*, 891 F.2d 810, 819-823, 826-828 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990). Neither the District Court nor the Court of Appeals reached or resolved these factual issues raised by respondents' summary judgment motions.

> but not limited to appropriate utilization of hospital facilities, in which privileges are sought ... [emphasis added].

As respondents' counsel no doubt advised, the foreseeable anticompetitive effects of this state regulatory policy were sufficient to immunize public hospitals from antitrust liability in access cases involving *M.D.s*, *dentists*, and *podiatrists*, as was subsequently held by the Fourth Circuit in its *Coastal* and *Sandcrest* decisions.[6] But during respondents' deliberations on whether to recommend granting or denying petitioner privileges, respondent Kilby, M.D., Chairman of the Hospital's Medical Executive Committee, lamented that "[n]o other discipline is mentioned" in N.C. Gen. Stat. § 131E-85(a). Dr. Kilby explained:

> However, Chapter 90 of the General Statutes, which is the law on medicine and allied occupations, contains a statute which says that a licensed chiropractor may have access to and practice chiropractic in a public hospital. This law has been on the books since 1919 but apparently is ignored when the hospital law is updated

---

[6]*Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Mem. Hosp.*, 795 F.2d 340, 341-342 (4th Cir. 1986); *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp.*, 853 F.2d 1139 (4th Cir. 1988).

> from time to time. Recently the Institute of Government in Chapel Hill published a new book on North Carolina hospital law, ... [which] devoted an entire chapter to staff privileges, but completely omitted any reference to this law on chiropractors.

The North Carolina Chiropractor Hospital Access statutes to which Dr. Kilby referred were:

> § 90-153. Licensed chiropractors may practice in public hospitals.
>
> A licensed chiropractor in this State *may* have access to and practice chiropractic in any hospital or sanitarium in this State that receives aid or support from the public, and *shall* have access to diagnostic x-ray records and laboratory records relating to the chiropractor's patient [emphasis added].

And:

> § 90-157.1. Free choice by patient guaranteed.
>
> *No* agency of the State, *county or municipality*, nor any commission or clinic, *nor any board administering ... health service* under the laws of ... North

> Carolina *shall deny* to the recipients or beneficiaries of their aid or services *the freedom to choose a duly licensed chiropractor as the provider of care or services* which are within the scope of practice of the profession of chiropractic as defined in this Chapter [emphasis added].

Although § 90-153 uses the term that chiropractors *may* have access to and practice in public hospitals, indicating that no hospital must admit *every* chiropractor, when read together with § 90-157.1 that any public hospital patient *shall* have the right to be attended by a chiropractor, the conclusion is inescapable that any public hospital upon request must admit at least *one* chiropractor to its staff at some point. This clearly articulated state policy is further borne out by the North Carolina legislature's *rejection* in 1977 of an amendment that would have added: "The provisions of this section shall not be deemed to require the admission of any chiropractor as a staff member of any hospital or medical institution."

Nonetheless, petitioner's case was dismissed, in both the District Court and the Court of Appeals, on the ground that the private M.D. respondents were acting pursuant to a clearly articulated state policy to supplant competition—i.e., the inapplicable N.C. Gen. Stats. § 131E-85(a)—and therefore were immune from antitrust liability under the LGAA (damages) and the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) (injunctive relief). Although petitioner argued

in dozens of briefs before both of these courts that the relevant "clearly articulated state policy" was not the inapplicable § 131E-85(a), but was instead the North Carolina Chiropractor Hospital Access statutes, both courts simply stonewalled the issue.

In their antitrust analyses neither court even *mentioned* the North Carolina Chiropractor Hospital Access statutes, much less explained why § 131E-85(a), instead of the Chiropractor Hospital Access statutes, controlled the issue of state action antitrust immunity. (6a-10a, 16a-19a.) Respondents similarly maintained consistent silence on this fundamental issue throughout the litigation until pressed to respond by the Fourth Circuit at oral argument, when respondents' counsel answered feebly that "legislative drafting is not perfect". Yet the North Carolina legislature had made crystal clear its pro-competitive policy of granting chiropractors access to public hospitals—until the Fourth Circuit judicially repealed that legislative policy *sub silentio.*

While this appeal was being briefed, the Fourth Circuit decided *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 973 (1992), exonerating staff M.D. defendants in revoking the private hospital privileges of another *non-competing* M.D. In *Oksanen*, the Fourth Circuit reasoned that under a "functional analysis" mandated by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-772 (1984), the intracorporate conspiracy doctrine applied to require that those private M.D. defendants be treated as "employees" or "agents" of the hospital for purposes of

making staff peer review decisions. 945 F.2d at 702-704.

But the Fourth Circuit reached that result only after finding through careful examination that none of the private M.D. defendants there actually *competed* with Dr. Oksanen. While refusing "to cloak in federal antitrust law what is in essence a workplace dispute", the Fourth Circuit reaffirmed the general antitrust principle that "medical staff ... physicians with independent and at times competing economic interests ... have the capacity to conspire as a matter of law." 945 F.2d at 699, 705-706.

In deciding the present case, however, the Fourth Circuit has extended *Oksanen* to immunize exclusionary hospital practices of private staff M.D.s having separate economic practices that indisputably *do compete* with petitioner. The Fourth Circuit has now magnified the intracorporate conspiracy doctrine far beyond what was contemplated in *Copperweld*, to allow independent competitors to conspire to exclude competition at virtually any gate-keeping bottleneck in the economic system.

Compounding that error, after rejecting petitioner's Sherman Act § 1 claims under the intracorporate conspiracy doctrine, the Fourth Circuit declined in this case to then consider, as it did in *Oksanen*, 945 F.2d at 709-710, whether the private defendants had nonetheless monopolized hospital services in the relevant geographic market, to exclude chiropractors in violation of Sherman Act § 2. Unlike in *Oksanen*, where there were competing hospitals in the relevant market (at one of which Dr. Oksanen retained

privileges after his ouster from Page Memorial), in this case Wilkes General was the only hospital in the relevant geographic market to which chiropractors and their patients could have had access.[7]

---

[7]If petitioner prevails on the antitrust immunity issue but not on the intracorporate conspiracy issue, this Court should remand for consideration of the § 2 claims. The private staff M.D. respondents had a monopoly over advising hospital trustees on privilege decisions, and assuming that monopoly power was legally acquired, it was abusively maintained by the exclusion of chiropractors. Remand would also be appropriate for the Fourth Circuit to reach and consider a new federal "peer review" discovery privilege created by the District Court. *See Cohn v. Wilkes Gen. Hosp.*, 127 F.R.D. 117, 119-121 (W.D.N.C. 1989) (reaffirmed at 16a). The effect of the Fourth Circuit's failure to reach this issue, given its disposition below (11a-12a), is to let stand a new federal discovery privilege unanimously rejected by every other court. *See, e.g., Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981); *Wei v. Bodner*, 127 F.R.D. 91, 94-95, 98-99 (D.N.J. 1989); *Jiricko v. Coffeyville Mem. Hosp. Med. Center*, 700 F. Supp. 1559, 1564 (D. Kan. 1988); *Quinn v. Kent Gen. Hosp.*, 617 F. Supp. 1226, 1244-1246 (D. Del. 1985); *Robinson v. Magovern*, 83 F.R.D. 79, 89 (W.D. Pa. 1979); *Feminist Women's Health Center, Inc. v. Mohammed, M.D.*, 586 F.2d 530, 544n.9 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *Pinkard v. Johnson*, 118 F.R.D. 517, 520 (M.D. Ala. 1987); *Ott v. St. Luke Hosp. of Campbell County*, 522 F. Supp. 706, 711 (E.D. Ky. 1981); *Schafer v. Parkview Mem. Hosp., Inc.*, 593 F. Supp. 61, 65 (W.D. Ind. 1984); *Dorsten v. Lapeer County Gen. Hosp.*, 88 F.R.D. 583, 586 (E.D. Mich. 1980). In creating its new "peer review" discovery privilege, the District Court erroneously relied, in part, on the inapplicable Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq. See Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842, 1848n.12 (1991); *Tambone v. Memorial Hosp. for McHenry County, Inc.*, 825 F.2d 1132, 1135n.2 (7th Cir. 1987); *Wei supra*, 127 F.R.D. at 99-100.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CREATES A CLEAR CONFLICT AMONG THE CIRCUITS, BY EXTENDING "STATE ACTION" ANTITRUST IMMUNITY FROM ANTICOMPETITIVE ACTIVITIES CONTEMPLATED BY A "CLEARLY ARTICULATED STATE POLICY" TO THOSE EXPRESSLY PROHIBITED BY THE RELEVANT STATE STATUTE

Since *Parker v. Brown*, 317 U.S. 341 (1943), state regulatory action having anticompetitive effects has been immune from the federal antitrust laws only to the extent consistent with a "clear articulation of a state policy to authorize anticompetitive conduct." In subsequent decisions, and as codified (at least for damage liability) in the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 *et seq.*, the *Parker* immunity doctrine has been extended to municipalities acting pursuant to state authorization, including private persons carrying out the municipal policy. *See Capital Freight Services, Inc. v. Trailer Marine Transport Corp.*, 704 F. Supp. 1190, 1201 (S.D.N.Y. 1989).

In recent years, considerations of federalism have caused the "clearly articulated state policy" doctrine to be construed liberally so as to enlarge the scope of governmental antitrust immunity. The state policy to suppress competition need not be explicit—i.e., need not expressly endorse particular regulatory actions distorting otherwise free market outcomes for particular economic activities—as long as the

anticompetitive impact is a "foreseeable result" of the state's general policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42-44 (1985). And as long as there is state authorization, immunity persists even though municipalities or subordinates may exercise the authority erroneously, improperly, or even illegally. *Columbia v. Omni Outdoor Advertising, Inc.*, 111. S. Ct. 1344, 1349-1350 (1991).

Exactly where the line may be drawn between state authorization and non-authorization in a particular case is not the issue here. The North Carolina legislature drew the line clearly, only to have it erased by the Fourth Circuit. The legislature in N.C.G.S. § 131E-85(a) clothed public hospitals with broad discretion to grant or deny privileges to M.D.s, dentists, and podiatrists, but limited that authority through the separate Chiropractor Hospital Access statutes (N.C.G.S. §§ 90-153 & 90-157.1), expressly mandating access to public hospitals by chiropractors and their patients. Thus, the North Carolina legislature was not merely silent or neutral about chiropractor hospital access, which would have been enough for petitioner under *Community Communications Co. v. Boulder*, 455 U.S. 40, 55 (1982), but *affirmatively prohibited* the exclusionary practices challenged.

Until the Fourth Circuit's decision, judicial precedent was virtually unanimous that a state statute authorizing regulation to supplant competition applies only as far as the statute authorizes, and no further. *See, e.g., Lancaster Community Hospital v. Antelope Valley Hospital Dist.*, 940 F.2d 397, 400-404 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168 (1992) (mere state

authorization for public hospitals to "do business" did not override other pro-competitive state policies). *See also, e.g., Wall v. City of Athens*, 663 F. Supp. 747, 759-760 (M.D. Ga. 1987) (state policy permitting municipal monopolies over county water services did not extend to city's price discrimination practices); *Hart Productions, Inc. v. Greater Cincinnati Convention and Visitors Bureau*, 1990-2 Trade Cas. (CCH) ¶ 69,233 (S.D. Ohio) (statutes authorizing municipalities to levy lodging taxes to establish local convention centers "do not express a clear state policy to displace competition for the leasing of convention center space," *citing Cincinnati Riverfront Coliseum, Inc. v. Cincinnati*, 556 F. Supp. 664, 668 (S.D. Ohio 1983); *New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 808-810 (S.D.N.Y. 1986) (grant of exclusive cable TV franchise did not authorize foreclosure of competition in programming services); *Bloom v. Hennepin County*, 783 F. Supp. 418 (D. Minn. 1992) (statute authorizing government entities to contract for provision of medical services would not immunize participation in market allocation scheme).[8]

---

[8]The pro-chiropractor statutes on which petitioner relies are unique to North Carolina and are in stark contrast with the blanket statutory antitrust immunity afforded public hospital staff privilege denials in some other states. In Georgia, for example, hospitals are authorized to revoke privileges for *any* reason. *See Sweeney v. Athens Regional Med. Center*, 709 F. Supp. 1563 (M.D. Ga. 1989). In Alabama a hospital is given enumerated powers "notwithstanding that as a consequence of such exercise of such powers it engages in activities that may be deemed 'anticompetitive' within the contemplation of the antitrust laws." *See*

(footnote continued on next page)

Although this principle seems as self-evident as the more general proposition that there either is or is not a state policy conferring antitrust immunity, the Fourth Circuit's error is magnified by the existence of *contrary* state hospital access statutes specifically enacted for the benefit of chiropractors and their patients. Through extensive briefing and oral argument, the courts below were fully aware of N.C.G.S. §§ 90-153 & 90-157.1, but ignored them. Respondents below likewise relied exclusively on N.C.G.S. § 131E-85(a), although it does not even apply to chiropractors, and the principal case construing it, *Coastal Neuro-Psychiatric Assocs. v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340, 341 (4th Cir. 1986), as explained by the Fourth Circuit in this case, related only to "a municipal hospital's power to decide which *physicians* [i.e., M.D.s] are entitled to privileges."[9]

(footnote continued from previous page)
Griffith v. Health Care Auth. of City of Huntsville, 705 F. Supp. 1489, 1505 (N.D. Ala. 1989). Through the democratic process, chiropractors were able to persuade the North Carolina legislature otherwise, but the Fourth Circuit has judicially repealed, for antitrust purposes, the public hospital access that the North Carolina legislature clearly sought to afford chiropractors.

[9] 10a (emphasis added). The Fourth Circuit seemingly relied upon N.C.G.S. §§ 131E-7(a)(6) (allowing municipalities to establish hospital fee schedules) and 131E-5 (allowing municipalities to construct, operate, and maintain hospitals), 10a, but these provisions reflect no "clearly articulated state policy" regarding hospital *privileges*, the subject to which § 131E-85(a), in the case of M.D.s, and §§ 90-153 & 90-157.1, in the case of chiropractors, are *specifically* directed. It would make no sense for a court to rely upon extremely general language (e.g., the § 131E-5

(footnote continued on next page)

II. BY ITS RADICAL EXTENSION OF THE INTRACORPORATE CONSPIRACY DOCTRINE AS AN ANTITRUST DEFENSE, THE FOURTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THOSE OF ALL OTHER CIRCUITS AND THIS COURT

Until this decision, *every* other Circuit addressing the issue, including the Fourth Circuit in *Oksanen*, has held that private M.D.s controlling hospital privileges decisions are "independent economic entities" who can "conspire", for Sherman Act § 1 purposes, at least where the private M.D.s *are in direct economic competition with the excluded applicant.*[10]

(footnote continued from previous page)
authorization of municipalities to "operate" public hospitals) as a basis for ignoring more *specific* statutes, such as the Chiropractor Hospital Access Statutes, telling municipalities *how* they must operate their hospitals. Yet this is exactly what the Fourth Circuit has done. This case never involved any request by petitioner that Wilkes General expand or alter its facilities to accommodate him (e.g., by building a "chiropractic wing") or any claim by Wilkes General, which operates with one-third of its beds empty, that it lacked the physical facilities to accommodate a staff chiropractor who would actually increase hospital revenues.

[10]*See, e.g., Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1446n.1 (11th Cir. 1991); *Bolt supra*, 891 F.2d at 819; *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988); *Weiss v. York Hosp.*, 745 F.2d 786, 814-817 (3d Cir. 1984), *cert. denied sub nom. Medical and Dental Staff v. Weiss*, 470 U.S. 1060 (1985); *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 282 (4th Cir. 1986) (Motz, J, concurring); *Pudlo v. Adamski*, 1992-1 Trade Cas. (CCH) ¶ 69,764 (N.D. Ill.). The many hospital staff conspiracy to exclude competitor cases include *Summit Health, Ltd. supra*, 111 S. Ct. at 1845-

(footnote continued on next page)

The two other Circuit decisions on which *Oksanen* relied likewise held that only *non-competitors* with the excluded doctor were "agents" or "employees" of the hospital for peer review purposes, and thus protected from § 1 "conspiracy" allegations by the intracorporate immunity doctrine. But both decisions reaffirmed that M.D. *competitors* with the excluded doctor had a sufficient "independent stake" to make them independent economic operators capable of conspiring.

Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 612-615 (6th Cir. 1990), *modified on reh'g*, 927 F.2d 904, *cert. denied*, 112 S. Ct. 406 (1991), held that obstetricians *were* capable of conspiring, because they *did compete* with the excluded nurse midwives, but that the pediatrician defendants were incapable of conspiring because they did not so compete ("when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members"). Similarly, in *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 119 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (cited in *Oksanen*,

---

(footnote continued from previous page)
1846, 1849 (Scalia, J, dissenting) ("[t]his Court treats this case as involving ... a conspiracy among eye surgeons at Midway Hospital to eliminate one of their competitors"), although only the interstate commerce issue was addressed and decided.

945 F.2d at 703), the Third Circuit reaffirmed its holding in *Weiss* that *competing* physicians can conspire, but found that none of the medical staff committee members in *Nanavati* were cardiologists who could have had any competitive motivation for the plaintiff cardiologist's exclusion.

In *Oksanen*, bearing out its "functional" test of intracorporate conspiracy as to whether exclusion of *competition* was actually involved, the Fourth Circuit took pains to point out:

> This case is not one in which a representative of a class of competitors is being excluded from the market. *Cf. Oltz* (attempt to exclude nurse anesthetist); *Cooper* (attempt to exclude podiatrists); *Weiss* (attempt to exclude osteopath). Oksanen, as an individual competitor, may have been hurt by the hospital's decision to revoke his privileges, but there is no evidence that competition as a whole in the relevant market has been harmed.

945 F.2d at 709.[11]

---

[11]The issue raised by petitioner here is whether his individual competitors, the staff M.D. respondents, can conspire among themselves, *not* whether the Hospital (not a defendant) is legally capable of conspiring *with* its staff M.D.s. The latter question was answered in the negative by *Oksanen*, 945 F.2d at 702-705; *Nurse Midwifery*, 918 F.2d at 614; *Nanavanti*, 857 F.2d at 118; and *Weiss*, 745 F.2d at 814; *contra Oltz*,

(footnote continued on next page)

But *this case* involves precisely that situation—the exclusion of *all* chiropractic competition from the

---

(footnote continued from previous page)
861 F.2d at 1450; *Bolt v. Halifax Hosp. Med. Center*, 851 F.2d 1273, 1280 (11th Cir. 1988).

Another matter not at issue here concerns the effect of the ratification of the private M.D. respondents' adverse recommendation by the Wilkes Board of Trustees. *Pudlo v. Adamski supra*, though finding that the competing staff M.D.s could be independent conspirators, concluded that plaintiff nonetheless could have suffered no antitrust injury because "the Hospital's Governing Board retained ultimate responsibility for the decision of whether Pudlo's staff appointment would be terminated" for alleged malpractice, citing *Oksanen*, 945 F.2d at 706. Both *Pudlo* and *Oksanen*, however, involved M.D.s as to whom state law (N.C.G.S. § 131E-85(a)) clothes hospital boards with broad discretion whether to grant or deny privileges. Here the North Carolina Chiropractor Hospital Access Statutes negate the authority of both the Wilkes Hospital Board and the private M.D. staff respondents from blanket denial of all chiropractor privileges.

A finding by this Court that the private M.D. respondents were not immune because of the North Carolina Chiropractor Statutes would require the Fourth Circuit on remand to reconsider its analysis that respondents' "undue influence" over the Board (i.e., petitioner's privileges would likely have been granted but for the M.D.s' adverse recommendation) "is irrelevant once the determination is made that the municipality is acting as authorized within the clearly articulated state policy ... to decide which physicians are entitled to privileges." (10a-11a.) Otherwise, the mere rubber stamp of a hospital board which itself may be immune from antitrust liability under *Omni* would *ipso facto* immunize from antitrust scrutiny all other non-immune private anticompetitive activities excluding hospital users. Since the relevant state policy regarding chiropractors is to the contrary, applying the *Pudlo/Oksanen* rule to the Trustees' ratification here, or holding that a separate conspiracy by the staff M.D.s to "unduly influence" the board must be treated as a legally impossible conspiracy *between* the staff and the hospital, would violate "the well established principle that ' a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Omni*, 111 S. Ct. at 1353.

market for hospital services by higher priced, less effective M.D.s who control hospital access.[12] In direct contrast to *Oksanen*, *Nanavati*, and *Nurse Midwifery*, the record here indisputably showed that virtually all of the private M.D. defendants treat the same musculoskeletal disorders that chiropractors treat and are in direct competition with petitioner. Yet the Fourth Circuit inexplicably held, contrary to *Oksanen* itself, that the intracorporate conspiracy doctrine applies, even where the private M.D. "agents" or "employees" of the hospital *are* in direct competition with the excluded "representative of a class of competitors".

In *Oksanen*, 945 F.2d at 704, the Fourth Circuit sought to distinguish *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1450 (9th Cir. 1988), as a case of actions undertaken "outside the peer review process" by anesthesiologists to exclude a lower cost nurse anesthetist. But whether antitrust violators perpetrate their conspiracy privately or under the aegis of some "official organization" is not the proper test of whether the violators had independent economic motives to conspire under § 1. And especially where, as in this case, an entire class of competitors is being excluded, "peer review" terminology is itself inapt. Petitioner had never previously been admitted to

---

[12]The Fourth Circuit made no mention of the impact of excluding chiropractors on consumers, a factor deemed relevant in *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 105 (4th Cir. 1987).

practice in the Hospital, and his exclusion was not for reasons of any past "malpractice" or misconduct (as in *Oksanen*). Indeed, petitioner's qualifications as a competent and licensed chiropractor were never at issue in his exclusion. Respondents claimed only that admitting *any* chiropractor would lower the "quality of patient care" at the Hospital, a defense definitively rejected in *Wilk v. American Medical Ass'n supra.*

Copperweld held only, and not surprisingly, that parent and subsidiary corporations were a single entity for Sherman Act § 1 conspiracy/combination purposes. The Fourth Circuit has now expanded *Copperweld* to negate federal antitrust laws far beyond what this Court intended and far beyond what other courts since *Copperweld* have held.[13]

The potential ramifications of this new doctrine, outside as well as inside the hospital health services area, are not minor. If staff M.D.s at a hospital cannot legally "conspire", in § 1 terms, to exclude their competitors from hospital access, what would prevent small shop owners at a dominant local shopping mall, in the guise of a "Tenants Admission Association" "employed" by the mall's management, from excluding any lower pricing K-Mart or Walmart that wanted to become a new mall tenant? What would prevent the

---

[13] *See, e.g., Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985), *vacated & remanded on other grounds*, 475 U.S. 1105 (1986) (antitrust); *Scott v. Township of Bristol*, 1990 U.S. Dist. Lexis 15313 at *25 (E.D. Pa.) (civil rights conspiracy); *cf. also Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985).

few airlines that already have landing rights at any major airport from having their "Landing Rights Committee", "employed" by the Airport Authority, exclude competing airlines that sought to obtain landing rights?[14] Under the Fourth Circuit's new intracorporate conspiracy doctrine, wherever our economic system requires some bottleneck "gatekeeper", the federal antitrust laws are now a dead letter which only this Court can revive.

III. EXCLUSIONARY AND ANTICOMPETITIVE PRACTICES IN THE HEALTH CARE INDUSTRY RAISE AN IMPORTANT ISSUE OF PUBLIC POLICY WHICH THE ANTITRUST LAWS SHOULD ADDRESS

The exclusion of chiropractors from hospital access involved in this case is the tip of an iceberg. Chiropractors are only one of many lower cost health provider groups subjected to the exclusionary practices of dominant M.D.s. Others include clinical psychologists, podiatrists, nurse practitioners, nurse midwives, nurse anesthetists, physical therapists, and medical technologists.[15] Petitioner does not suggest

---

[14]This would be a clever arrangement indeed if the existing airlines were already fixing prices. *Cf. In re Domestic Air Transportation Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991).

[15]*See, e.g.*, Richards, "Nonphysician Practitioners Make Slow Headway on Staff Privileges," 58 *J. Am. Hosp. Ass'n* 82 (1984).

that hospital access for chiropractors alone, or for all of these "allied health professionals" combined, would instantly halt the out of control spiral in health care costs. But surely the potential is there for savings of billions of dollars annually, if the antitrust laws were made enforceable.

In the context of the consumer interests that the antitrust laws are designed to protect, exclusion of an entire class of competitors fundamentally distinguishes petitioner's case from the run-of-the-mill hospital privileges antitrust case pitting an excluded M.D. plaintiff against other staff M.D.s, many of which, as in *Oksanen*, may be improperly motivated by malpractice, misconduct, or other legitimate hospital considerations unrelated to the suppression of competition.

Government antitrust officials have echoed this theme. In a speech to the American Medical Association, Justice Department Antitrust Division head Charles F. Rule commented:

> Competition and the market discipline it generates are simply the last best hope to slow sky-rocketing health-care costs that endanger the prospects for universal health care and threaten to hemorrhage the federal deficit. The discipline of competition is also the best way to stave off the push for socialized medicine....
>
> Clear violations of the antitrust laws occur when otherwise competing professionals agree to do something, or to refrain from doing something, that blocks

> the free operation of the competitive process without any plausible promise of economic benefits for consumers.... "Naked" agreements of this kind—to fix prices, to allocate territories, or *to boycott competing health-care providers*—are unlawful regardless of their purpose and effect.[16]

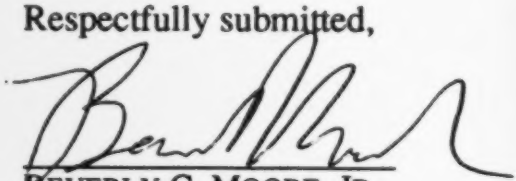
---

[16]Rule, Asst. Attorney General, Justice Dept., Antitrust Division, Speech Before the American Medical Ass'n, Dec. 6, 1988 at 2, 9 (emphasis added). Similarly, Federal Trade Commission Chairman Daniel Oliver, in a January 29, 1987 speech before the National Health Lawyers Association, reportedly pledged an FTC "fight against ... professional boycotts", including situations "both where physicians are pitted against physicians or non-physicians", as illustrated by FTC "'consent settlements in cases in which physicians had unreasonably denied hospital privileges to podiatrists for economic reasons unrelated to competence.' " *Oliver Promises FTC Will Fight For More Competition in Health Care Area*, Antitrust & Trade Reg. Rep. (BNA), No. 1301 at 211 (Feb. 5, 1987). In a speech before the same group in January 1989, M. Elizabeth Gee, then Assistant Director of the FTC Bureau of Competition's Health Care Division, condemned the "[u]se of the hospital privilege system by medical staffs to shield them from new competition from others." *NHLA Conferees Probe Pitfalls Facing Health Care Providers*, Antitrust & Trade Reg. Rep. (BNA), No. 1401 at 171 (Feb. 2, 1989). Ms. Gee now represents the respondents in this action. 3a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



B. ERVIN BROWN, II
Moore & Brown
240 Branch Bank & Trust Bldg.
8 West Third Street
Winston-Salem, N. Carolina 27101
(919) 723-7966

BEVERLY C. MOORE, JR.
(Counsel of Record)
SANDRA B. BRANTLEY
Moore & Brown
4900 Massachusetts Ave., N.W.
Suite 230
Washington, D.C. 20016
(202) 364-1032

Counsel for Petitioner

May 11, 1992

APPENDIX A

UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT
NO. 91-2502

R. Ernest COHN, D.C., D.A.B.C.O.,
Plaintiff-Appellant,

vs.

JOHN L. BOND; JOHN BENNETT; LARRY S. KILBY; KAROLEN C. BOWMAN; DONALD D. PETERSON; KIRK D. GULDEN; JOHN G. OLIVER; JAMES K. HARTYE; THOMAS K. McMAHAN; LEONARD A. BAUGHAM; MARK D. ANDREWS; J. THOMAS BOWMAN; DUANE H. SMITH; JERRY F. WATSON, Individually and as Members of the Medical Staff of Wilkes General Hospital,
Defendants-Appellees,

and

WILKES GENERAL HOSPITAL; ANDREW L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, Individually and as Trustee of Wilkes General Hospital;

RALPH G. BUCHAN; NEIL G. CASHION, JR.; C. DENNIS FAW; GEORGE S. FORESTER, JR.; PAUL C. HOLBROOK; JOHN Q. MYERS; REX REEVES; ALVIN A. STURDIVANT, JR., Individually and as Trustees of Wilkes General Hospital; PHILLIP E. COMPEAU; WILLIAM L. BUNDY; JOHN Q. MYERS,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, Chief District Judge. (CA-88-44-ST)

Argued: October 31, 1991
Decided: December 31, 1991

Before WIDENER and HAMILTON, Circuit Judges, and RESTANI, Judge, United States Court of International Trade, sitting by designation.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Widener and Judge Restani joined.

COUNSEL

ARGUED: Beverly C. Moore, Jr., MOORE & BROWN, Washington, D.C., for Appellant. M. Elizabeth Gee, WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina, for Appellees. **ON BRIEF:** Sandra B. Brantley, MOORE & BROWN, Washington, D.C.; B. Ervin Brown, II, MOORE & BROWN, Winston-Salem, North Carolina, for Appellant. Roddey M. Ligon, Jr., WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina; W. Harold Mitchell, MITCHELL, BLACKWELL & MITCHELL, Valdese, North Carolina; William Kearns Davis, James R. Fox, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellees.

OPINION

HAMILTON, Circuit Judge:

R. Ernest Cohn, a chiropractor, filed this case complaining that Wilkes General Hospital and its medical staff improperly denied his request for staff privileges in violation of Section 16 of the Clayton Act, 15 U.S.C. § 26 (1973); Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1973); and in violation of a North Carolina statute concerning access to public hospitals by chiropractors. N.C. Gen. Stat. § 90-153 (1991). Dr. Cohn appeals from an order of the United States District Court for the Western District of North Carolina granting summary judgment to John L. Bond and other members of the medical staff of Wilkes

General Hospital, and dismissing Dr. Cohn's state law claim. We find that the defendants' actions are shielded by operation of the Local Government Antitrust Act (LGAA), the State Action Doctrine and intracorporate immunity. The decision of the district court is hereby affirmed.

I.

Dr. Cohn practices in Wilkesboro, North Carolina. Wilkes Hospital is a municipally owned and operated hospital under the City of Wilkesboro. Dr. John Bond is the named defendant of the medical staff of Wilkes Hospital. Other members of the medical staff are also defendants in this action.

In 1984, Dr. Cohn applied for privileges at Wilkes Hospital. In accordance with Wilkes Hospital's by laws, the request was referred to the Medical Staff Credentials Committee for review. The Committee recommended to the Board of Trustees of Wilkes Hospital (the "Board") that Dr. Cohn's application be denied. Their expressed reasons for denial were that the medical doctors would be unable to supervise care given by a chiropractor, and that granting hospital privileges to a chiropractor may not be permitted by law in North Carolina. Dr. Cohn appealed this decision to the Medical Executive Committee. The Executive Committee noted that chiropractors were permitted to practice in public hospitals, but that a hospital is not required to admit them. The Executive Committee otherwise affirmed the decision of the Credentials Committee. Dr. Cohn appealed this decision to the

Board. On May 28, 1985, the Board met and heard testimony from Dr. Cohn. Thereafter, the Board went into closed executive session and decided to deny Dr. Cohn's request for privileges. The Board cited as ground for its decision: (1) concerns over the ability of medical staff to supervise Dr. Cohn, (2) a lack of requests for chiropractic care at Wilkes Hospital, (3) insurance concerns, (4) the absence of reasons why such services need to be administered in a hospital, (5) the lack of similar privileges to a chiropractor in other hospitals, and (6) a lack of knowledge necessary to monitor fees by chiropractors. After a subsequent request from Dr. Cohn for limited privileges, and a request for reconsideration of his initial application, the Board affirmed its earlier denial on July 22, 1986, and again on October 27, 1987.

Dr. Cohn's suit originally named Wilkes Hospital, members of the Board, and members of Wilkes Hospital's medical staff. The only parties remaining at the summary judgment stage were the Board and the medical staff members. Dr. Cohn dropped Wilkes Hospital as a party in his third amended complaint. (Complaint, J.A. at 173-182). Dr. Cohn appeals only the granting of summary judgment with respect to his causes of action against the medical staff. Dr. Cohn specifically notes in his brief that the Trustees (Board) are not involved in this appeal. (Appellant's Brief at 3, n.1).

The district court granted summary judgment on the grounds that the conduct challenged was immunized under the Local Government Antitrust Act, 15 U.S.C. § 34 (Supp. I 1984), and under the State Action Doctrine.

The district court also exercised its discretion to dismiss Dr. Cohn's pendant state claim, and denied Dr. Cohn's motion to reconsider the district court's earlier denial of a motion to compel discovery of certain Board meetings. The district court held that such meetings were privileged and not subject to discovery.

Dr. Cohn appeals, claiming that the district court erred in extending LGAA and State Action Doctrine immunity to the staff members who recommended that he be denied privileges at Wilkes Hospital. Dr. Cohn also appeals the district court's denial of discovery of the Board's proceedings in executive session. Lastly, he claims that the district court erred in that the state claim it dismissed was one he had already dropped, and that the district court never dismissed the actual state claim he was asserting.

II.

The appropriate standard of review for the granting of summary judgment is *de novo*. A decision of the trial court refusing to continue discovery is upheld absent an abuse of discretion. *Sandcrest Outpatient Services v. Cumberland City*, 853 F.2d 1139, 1148 (4th Cir. 1988).

III.

The LGAA provides immunity to any local government, official or employee acting in an official capacity from money damages in an antitrust case. 15 U.S.C. § 36. The appellant does not appeal the

determination by the district court that Wilkes Hospital is a local governmental unit covered by the LGAA. The LGAA also provides immunity to a person who is not an employee or official if that person is "engaged in 'official action directed by a government or official or employee thereof.' " *Sandcrest*, 853 F.2d at 1143 (quoting, 15 U.S.C. § 36(a)).

The facts in *Sandcrest* are similar to the facts in this case. In *Sandcrest*, the administrator declined to extend the emergency room service contract of Sandcrest Services. Sandcrest Services brought an antitrust action on the grounds that it was improperly excluded from providing services by the hospital, its board of trustees, the administration, and the medical staff. This court upheld the district court findings that the hospital, the administrator, and the medical staff committee were immune from such suits under the LGAA. This court held that the actions of the medical staff were "directed by" officials of the governmental entity, as contemplated by the LGAA. Whether actions are "directed by" an official, as contemplated by the LGAA, is determined by borrowing and applying the State Action Doctrine two prong test. *Sandcrest*, 853 F.2d at 1143, *citing* H.R. Conf. Rep. No. 1158, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S.C.C.A.N. 4602, 4627.

In *Sandcrest*, the members of the medical staff were found to be immunized by the LGAA because their actions were "directed by officials." In light of our recent decision in *Oksanen v. Page Memorial Hospital*, 945 F.2d 733 (4th Cir. 1991), the medical staff's conduct in this case is more directly immune. *Oksanen*

holds that when members of the medical staff recommend action on an application for privileges, as authorized by the municipal hospital, they are acting in their capacity as employees, as opposed to private parties. *Id.* Physicians who make peer review decisions at the behest of, or by delegation from, the hospital's board of trustees, are acting as agents of the hospital and are, therefore, indistinguishable from the hospital.

In the instant case, the members of the medical staff acted as authorized by the staff bylaws and the Board. The medical staff members are, in making staff privilege recommendations, acting as agents of Wilkes Hospital. Therefore, their actions in this respect are entitled to immunity from money damages under the LGAA because of their unitary status with Wilkes Hospital.

IV.

The district court recognized that the determination that the defendants were immunized from money damages did not settle the question of whether injunctive relief was permitted. The LGAA does not extend its immunity to injunctive relief. "Both the House and the Senate ... were careful to observe that the immunity being provided to local government was immunity from suits for damages, and not immunity from suits seeking injunctive relief." *Sandcrest*, 853 F.2d at 1142 (4th Cir. 1988) (citing S. Rep. No. 593, 98th Cong., 2d Sess. 2 at 5-6 (1984)); H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S.C.C.A.N. 4602, 4603. The district court correctly

held, however, that State Action Doctrine immunity precludes injunctive relief in this case. If an action falls within this doctrine, it is immunized from antitrust scrutiny. *Patrick v. Burget*, 486 U.S. 94 (1988).

The modern touchstone case of the State Action Doctrine is *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Court declined to apply the Sherman Act to actions by a state. With respect to municipalities, the application of the doctrine was further explained in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 413 (1978). *Lafayette* determined that a two prong test must be met before the action in that case was immunized. The first prong was that the action must be "one clearly articulated and affirmatively expressed as state policy." 435 U.S. at 410. The second prong that must be met is that the policy must be "actively supervised." *Id.* Because the *Lafayette* case involved a private party, some confusion remained as to whether a municipality was required to meet the second "active supervision" prong. The court made it clear in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985), that municipalities do not need to meet this second prong.

Wilkes Hospital is owned and operated by a municipality and the application of the second prong to the medical staff members depends on whether they are employees or private parties. As employees, their actions are judged by the first prong, as private parties, their actions are judged by both prongs.

As previously discussed, members of the medical staff acted as agents of Wilkes Hospital in making their recommendation to deny privileges. The second,

"active supervision" prong is, therefore, inapplicable in this case. With respect to the first prong, it is clear from this court's decision in *Coastal Neuro-Psych v. Onslow Memorial*, 795 F.2d 340 (4th cir. 1986), that "North Carolina statutes authorizing municipalities to construct, operate and maintain hospitals ... contemplate anticompetitive effects." *Id.* at 341 (citing N.C. Gen. Stat. §§ 131E-5, 131E-7(a)(6)). The decision in *Coastal Neuro-Psych* expressly indicated that this was true with respect to a municipal hospital's power to decide which physicians are entitled to privileges. 795 F.2d at 341. A municipal hospital's decision to deny privileges, therefore, meets the first prong of the *Parker* test. The actions of the staff are immune when, as is true here, they are acting as agents of Wilkes Hospital, a municipal hospital, in making their recommendation.

V.

Dr. Cohn contends that the medical staff exerted undue influence over the Board, thus supplanting the Board's decision. However, the medical staff in this case was acting in a manner similar to the medical staff in *Oksanen*. They were acting as agents of the hospital. *Oksanen* held that in such circumstances the doctrine of intracorporate immunity applies. This doctrine dictates that a single entity cannot conspire amongst itself. Since the medical staff and Wilkes Hospital, in these circumstances, are the same entity, undue influence is irrelevant. A single entity cannot unduly influence itself. Furthermore, the recent case of *Columbia v.*

Omni Outdoor Advertising, 111 S. Ct. 1344, 1353 (1991), leads us to conclude that undue influence is irrelevant once the determination is made that the municipality is acting as authorized within the clearly articulated state policy. "[A]ny action that qualifies as state action is 'ipso facto ... exempt from the operation of the antitrust laws.' " *Id.* (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984)). We already determined that the Board's actions were so authorized and met the first prong of the *Lafayette* test. Relevant inquiry in this case ends with the finding that the first prong is met and the medical staff of Wilkes Hospital acted as authorized under a state policy meeting the requirements of the first prong. The presence of undue influence has no bearing on the finding that Wilkes Hospital and its staff are immune under the State Action Doctrine and the LGAA.

VI.

Since the actions of the staff were immunized under the LGAA and the State Action Doctrine, we need not consider whether it was appropriate to preclude discovery of the closed door sessions of the Board. Dr. Cohn seeks discovery of these proceedings to show further evidence of conspiracy among the staff and to show undue influence on the Board.

As previously noted, undue influence is irrelevant under the facts in this case. Because it is irrelevant, the denial of discovery to find evidence of undue influence is appropriate.

Any evidence of conspiracy among the staff in making its recommendation is similarly irrelevant. *Sandcrest*, 853 F.2d at 1146. Inquiry into the motives of the staff is not proper to determine if immunity exists. An allegation of conspiracy "is akin to an allegation that it was done in bad faith or with malice." *Id.* Such inquiries are clearly irrelevant in determining the application of the immunity. Furthermore, as this court discussed in *Oksanen*, conspiracy cannot be found where the medical staff and the hospital are essentially the same entity. Therefore, discovery with respect to evidence of a conspiracy is unnecessary.

Discovery should not become a "fishing expedition." *Sandcrest*, 853 F.2d at 1147. This is true particularly in this case in light of the underlying purposes of the LGAA and the State Action Doctrine, *i.e.*, to free local government from the fear of, and the dehabilitating effects of antitrust actions. *See id.* Discussions in the closed door sessions could only be relevant with respect to whether or not the immunities discussed above apply in these circumstances. There was sufficient information before the court to determine that the actions of the staff were immune. The refusal to allow continued discovery where it was unnecessary is not an abuse of discretion. *See Sandcrest*, 853 F.2d at 1148.

VII.

When the district court granted the defendants' motion for summary judgment on all federal claims, it exercised its discretion to dismiss the plaintiff's pendant state court claim. The district court

misidentified the state claim before it as an "unfair trade practices cause of action under N.C. Gen. Stat. § 75-1.1." The plaintiff dropped this cause of action in his third amended complaint. The claim actually before the district court was an alleged violation of N.C. Gen. Stat. § 90-153, which involves access to hospitals by chiropractors.

As this was the only state claim before the court, it is apparent that this claim was the state claim which the court intended to dismiss. This error was clearly inadvertent and was harmless. There is no contention that the district court would rule any differently on remand. The harmless error rule compels this court to exercise its judgment rather than result to automatic reversal. Under 28 U.S.C. § 2111 (1982), the misidentification of the state court claim is not grounds for remand or reversal.

We find that the medical staff's actions are immune from antitrust scrutiny by operation of the LGAA, the State Action Doctrine and intracorporate immunity. We further find that the district court's error in misidentifying the state court claim that it dismissed was harmless error.

AFFIRMED

APPENDIX B

IN THE DISTRICT COURT OF
THE UNITED STATES FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

CIVIL NO. ST-C-88-44

R. Ernest COHN, D.C., D.A.B.C.O.,

Plaintiff,

vs.

WILKES GENERAL HOSPITAL; Andrew L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, M.D., RALPH G. BUCHAN, NEIL G. CASHION, JR., C. DENNIS FAW, GEORGE S. FORESTER, JR., PAUL C. HOLBROOK, JOHN Q. MYERS; REX REEVES, and ALVIN A. STURDIVANT, JR., individually and as Trustees of Wilkes General Hospital; JOHN L. BOND, M.D., JOHN BENNETT, M.D., PHILLIP E. COMPEAU, M.D., LARRY S. KILBY, M.D., KAROLEN C. BOWMAN, M.D., DONALD D. PETERSON, M.D.,

KIRK D. GULDEN, M.D., JOHN G. OLIVER, M.D., JAMES K. HARTYE, M.D., THOMAS K. McMAHAN, M.D., LEONARD A. BAUGHAM, M.D., MARK D. ANDREWS, M.D., J. THOMAS BOWMAN, M.D., WILLIAM L. BUNDY, M.D., DUANE H. SMITH, M.D., JOHN Q. MYERS, M.D.,and JERRY F. WATSON, M.D., individually and as members of the Medical Staff of Wilkes General Hospital,

Defendants.

MEMORANDUM OF OPINION

This matter is before the Court for the determination of three motions. The Defendants have moved for summary judgment and for preclusion of thirty-six designated witnesses proposed to be used at trial by the Plaintiff. The Plaintiff has moved for reconsideration of that portion of this Court's Order of June 29, 1989, which denied Plaintiff's motion to compel discovery. The Plaintiff's motion for reconsideration will be denied for the same reasons stated in and supporting the Order of June 29, 1990. The Defendants' motion for summary judgment will be

granted, and the motion for preclusion will be declared moot.

I. PLAINTIFF'S MOTION FOR RECONSIDERATION

The Plaintiff has moved for this Court to reconsider that portion of its prior Order of June 29, 1989, which denied the Plaintiff's request to compel discovery of communications made during executive sessions of various meetings of the Wilkes General Hospital Board of Trustees. However, this Court still adheres to the reasoning expressed in its prior Order (*See Cohn v. Wilkes General Hospital*, 127 F.R.D. 117 (W.D.N.C. 1989)) and will deny the motion for reconsideration.

II. SUMMARY JUDGMENT

The Defendants have moved for summary judgment based upon immunity from antitrust claims, lack of an effect of the denial of hospital privileges on interstate commerce, and lack of a showing by the Plaintiff of a conspiracy among the Defendants. The Defendants contend that the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 *et. seq.*, (hereinafter "LGAA") as well as recent decisions from the Fourth Circuit Court of appeals provide them with immunity from antitrust claims. The Plaintiff contends that the statute does not protect the "private physician Defendants" if they use their official capacities "as a cloak for advancing their private economic interests." Plaintiff's Opposition to Defendants Renewed Motion for Summary Judgment

filed November 21, 1989 at 4 (Pleading #95). The Plaintiff alleges that he seeks only injunctive relief against the "non-M.D. Board of Trustees Defendants" and that only the private physician Defendants will be required to pay damages, thus upholding the Congressional intent that municipal taxpayers not be required to pay antitrust damages. *Id.* at 5.

The contentions of the Plaintiff are not persuasive. The Fourth Circuit has recently given clear expression to the absolute immunity provided by the LGAA in a case remarkably similar to the present situation. *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital*, 853 F.2d 1139 (4th Cir. 1988). In *Sandcrest* the Fourth Circuit held that the immunity granted by the LGAA extended to a North Carolina county hospital's director, and members of the board of trustees, medical staff, and ad hoc committees. These Defendants had been sued in an antitrust action filed by an association of emergency room physicians whose contract with the hospital had been terminated. Nothing in the present case demonstrates that the reasoning of *Sandcrest* should not be followed.

The Plaintiff contends that under his allegations the individual doctors, unlike the *Sandcrest* defendants, improperly influenced the Board of Trustees in order to protect their professional interest. However, no evidence of improper persuasion has been presented in support of this claim. In addition, the Fourth Circuit itself noted:

> The LGAA makes no provision for consideration of a defendant's motives,

> and an allegation that an act was done pursuant to a conspiracy is akin to an allegation that it was done in bad faith or with malice. *Cf. Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir. 1987) (claim that a probation officer prepared a false presentence report was properly dismissed on grounds of immunity).

Sandcrest, supra, at 1146.

All that the Defendants need show in order to assert a valid claim of immunity from antitrust liability is that they acted in an official capacity or were directed by government officials or employees who were themselves acting in their official capacities.

> As previously discussed, these standards do not include a consideration of the defendant's intentions. The court considers only the objective questions: (i) whether, in light of the authority invested in a local government, its officials or employees, the actions complained of were lawful and taken within the scope of their authority, ... or (ii) whether, if the defendant is not a local government official or employee, the actions were directed by a local government or one of its officials or employees acting within the scope of his authority.

Sandcrest, supra, at 1148 (citations omitted).

Under the reasoning of *Sandcrest*, all of the Defendants have met the second prong of this test and are entitled to immunity under the LGAA for their actions in denying medical privileges to Dr. Cohn. (*See* N.C. Gen. Stat. § 131E-85(a), hospital's board of trustees authorized to make decision on grants, denials, and scope of privileges). While this determination resolves the question of liability on the part of the Defendants, it does not resolve the claim for injunctive relief raised by the Plaintiff.

Plaintiff seeks injunctive relief on the basis of alleged antitrust violations and unfair trade practices, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, and N.C. Gen. Stat. § 75-1.1 respectively. Section 16 of the Clayton Act permits injunctive relief "against threatened loss or damage *by a violation of the antitrust laws*." 15 U.S.C. § 26 (emphasis added). As established above, Defendants are immune from antitrust liability and, therefore, cannot be said to have violated the antitrust laws in this situation. *Griffith v. Health Care Authority*, 705 F. Supp. 1489 (N.D. Ala. 1989) (immunity under LGAA extends to suits seeking injunctive relief). Furthermore, Plaintiff has failed to establish that the time-honored balance-of-hardships test tips decisively in his favor. *See, e.g., Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 1189 (4th Cir. 1977). Plaintiff is therefore not entitled to injunctive relief under his antitrust claims.

The grant of Defendants' motion for summary judgment extinguishes both Plaintiff's antitrust cause of action and the Court's federal subject matter jurisdiction over this matter. Plaintiff's unfair trade

practices cause of action under N.C. Gen. Stat. § 75-1.1 may therefore be, and hereby is, dismissed for want of pendent jurisdiction. *See Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278, 280 n. 9 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986). However, the Court notes that medical professionals are not contemplated by North Carolina's prohibition of unfair trade practices. *See, e.g.*, N.C. Gen. Stat. § 75-1.1(b) ("For purposes of this section, 'commerce' ... does not include professional services rendered by a member of a learned profession."); *Cameron v. New Hanover Memorial Hosp., Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, *appeal dismissed & cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982); Opinion of Attorney General to Representative Robert L. Farmer, 47 N.C.A.G. 118 (1977). That, plus the fact that a court should not substitute its judgment for that of the hospital board, precludes the Court from enjoining Defendants' exclusion of Plaintiff from the Wilkes Hospital facility. *Cameron.*

Furthermore, the Court notes that the judicially created "state action doctrine" provides immunity to state agencies from claims for antitrust injunctive relief, when their activities are directed by the legislature. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). This doctrine applies to a municipality when its actions are authorized by state law. *Hallie v. Eau Claire*, 471 U.S. 34 (1985). The Fourth Circuit has since applied this rule specifically to North Carolina municipal hospitals in *Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hosp., Inc.*, 795 F.2d 340 (4th Cir. 1986), and reasoned that North

Carolina contemplated "anticompetitive effects" in authorizing municipalities to construct, maintain, and operate hospitals pursuant to N.C. Gen. Stat. § 131E-5. *Coastal Neuro-Psychiatric Associates*, 795 F.2d at 341.

A hospital's governing body has statutory authority to make decisions concerning the scope and range of privileges that will be extended to physicians and others at the hospital. N.C. Gen. Stat. § 131E-85(a). The Court finds that the Defendants have demonstrated that "their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service' " and are therefore entitled to the "state action doctrine" immunity from antitrust injunctive relief. *Coastal Neuro-Psychiatric Associates*, 795 F.2d at 341 (quoting *Hallie*, 471 U.S. at 38-39). Hence, Defendants' motion for summary judgment will be granted as to all claims asserted by the Plaintiff.

III. PRECLUSION

Because summary judgment will be granted to the Defendants on all counts, the Defendants motion to preclude thirty-six witnesses from testifying at trial is moot.

A Judgment encompassing the findings herein will be filed contemporaneously herewith.

THIS the 11th day of March, 1991.

/s/Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE DISTRICT COURT OF
THE UNITED STATES FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

CIVIL NO. ST-C-88-44

R. Ernest COHN, D.C., D.A.B.C.O.,

Plaintiff,

vs.

WILKES GENERAL HOSPITAL; Andrew L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, M.D., RALPH G. BUCHAN, NEIL G. CASHION, JR., C. DENNIS FAW, GEORGE S. FORESTER, JR., PAUL C. HOLBROOK, JOHN Q. MYERS; REX REEVES, and ALVIN A. STURDIVANT, JR., individually and as Trustees of Wilkes General Hospital; JOHN L. BOND, M.D., JOHN BENNETT, M.D., PHILLIP E. COMPEAU, M.D., LARRY S. KILBY, M.D., KAROLEN C. BOWMAN, M.D., DONALD D. PETERSON, M.D, KIRK D. GULDEN, M.D., JOHN G. OLIVER, M.D., JAMES K. HARTYE,

M.D., THOMAS K. McMAHAN, M.D.,)
LEONARD A. BAUGHAM, M.D.,)
MARK D. ANDREWS, M.D.,)
J. THOMAS BOWMAN, M.D.,)
WILLIAM L. BUNDY, M.D.,)
DUANE H. SMITH, M.D., JOHN Q.)
MYERS, M.D.,and JERRY F.)
WATSON, M.D., individually and as)
members of the Medical Staff of Wilkes)
General Hospital,)
)
Defendants.)
)

JUDGMENT

For the reasons stated in the Memorandum of Opinion filed contemporaneously herewith,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's motion for reconsideration of this Court's Order of June 29, 1990, is hereby DENIED;
2. Defendants' motion for summary judgment is hereby ALLOWED on all claims pursuant to 15 U.S.C. §§ 1 and 2 and such are DISMISSED on the merits;
3. Plaintiff's state claims for unfair trade practices pursuant to N.C. Gen. Stat. § 75-1.1 are DISMISSED for lack of jurisdiction; and
4. Plaintiff's motion for preclusion is hereby DISMISSED as moot.

THIS the 11th day of March, 1991.

/s/Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT
NO. 91-2502
FILED: February 10, 1992

R. Ernest COHN, D.C., D.A.B.C.O.,
Plaintiff-Appellant,

vs.

JOHN L. BOND; JOHN BENNETT; LARRY S. KILBY; KAROLEN C. BOWMAN; DONALD D. PETERSON; KIRK D. GULDEN; JOHN G. OLIVER; JAMES K. HARTYE; THOMAS K. McMAHAN; LEONARD A. BAUGHAM; MARK D. ANDREWS; J. THOMAS BOWMAN; DUANE H. SMITH; JERRY F. WATSON, Individually and as Members of the Medical Staff of Wilkes General Hospital,
Defendants-Appellees,
and
WILKES GENERAL HOSPITAL; ANDREW L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, Individually and as Trustee of Wilkes General Hospital; RALPH G. BUCHAN;

NEIL G. CASHION, JR.; C. DENNIS FAW; GEORGE S. FORESTER, JR.; PAUL C. HOLBROOK; JOHN Q. MYERS; REX REEVES; ALVIN A. STURDIVANT, JR., Individually and as Trustees of Wilke General Hospital; PHILLIP E. COMPEAU; WILLIAM L. BUNDY; JOHN Q. MYERS,
Defendants.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hamilton, with the concurrence of Judge Widener, and Judge Restani, Judge, United States Court of International Trade, sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

(2)

No. 91-1813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R. Ernest COHN, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. BOND, M.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

*Roddey M. Ligon, Jr.
M. Elizabeth Gee
Womble Carlyle Sandridge & Rice
P.O. Drawer 84
Winston-Salem, NC 27102
(919) 721-3600

William Kearns Davis
James R. Fox
Bell Davis & Pitt
635 W. Fourth Street
Winston-Salem, NC 27101
(919) 722-3700

W. Harold Mitchell
Mitchell, Blackwell & Mitchell
P.O. Drawer 69
Valdese, NC 28690
(704) 874-2271

*Counsel of Record

Attorneys for Respondents

TABLE OF CONTENTS

Page

STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 6

REASONS FOR DENYING THE WRIT 13

I. SUMMARY OF ARGUMENT 13

II. THE DECISION BELOW DOES NOT CREATE A CONFLICT IN THE CIRCUITS 14

A. The Court's Holding that Respondents' Conduct Was Exempt from the Antitrust Laws under the State Action Doctrine Was Proper and Does Not Conflict with the Decisions of Other Circuits 14

B. The Fourth Circuit's Conclusion that State Action Immunity for Municipal Hospital Privilege Decisions Extends to Recommendations Made by Medical Staff Committees that Are Delegated Responsibility for Making Such Recommendations Is Correct and Is Not in Conflict with Other Circuits 22

III. THIS CASE LACKS WIDESPREAD IMPORTANCE 26

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: Page

Butner v. United States, 440 U.S. 48 (1979) 17

Cameron v. New Hanover Memorial Hospital, Inc., 58 N.C. App. 414, 293 S.E.2d 901, *cert. denied*, 307 N.C. 127, 297 S.E.2d 399 1982) 19, 20

Claycomb v. HCA-Raleigh Community Hosp., 76 N.C. App. 382, 333 S.E.2d 333 (1985), *rev. denied*, 315 N.C. 586, 341 S.E.2d 23 (1986) 20

Coastal Neuro-Psychiatric Associates v. Onslow Memorial Hosp., 795 F.2d 340 (4th Cir. 1986) 16

Columbia v. Omni Outdoor Advertising, Inc., ___ U.S. ___, 111 S.Ct. 1344 (1991) 13, 24, 25

Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 973 (1992) 23, 24

Parker v. Brown, 317 U.S. 341 (1943) 11

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 13, 16

Statutes and Rules:

Local Governments Antitrust Act, 15 U.S.C. § 34 *et seq.* (1985) 6, 11-13, 22, 23

N.C. Gen. Stat. § 90-153 (1991) 5, 15, 18, 19

N.C. Gen. Stat. § 90-157.1 (1991) 5, 15, 19

N.C. Gen. Stat. § 131E-5(a) and (b) (1991) 2

N.C. Gen. Stat. § 131E-7(a)(1) (1991) 2

N.C. Gen. Stat. § 131E-85(a) and (b) (1991) . . . 3, 17, 18

N.C. Gen. Stat. § 131E-86 (1991) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1813

R. Ernest **COHN**, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. **BOND**, M.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari (filed with this Court on May 11, 1992 and received by respondents on May 14, 1992) be denied.

STATUTORY PROVISIONS AT ISSUE

The following statutory provisions not identified by petitioner as being at issue in this case must be interpreted and construed in order to reach the merits of petitioner's questions presented:

N.C. Gen. Stat. § 131E-5(a) and (b) (1991):

> § 131E-5. Title and purpose.
>
> (a) This Part shall be known and may be cited as the "Municipal Hospital Act."
>
> (b) The purpose of this Part is to authorize municipalities to construct, operate and maintain hospitals and other facilities which furnish hospital, clinical and similar services to the people of this State. It is also the purpose of this Part to authorize municipalities to cooperate with other public and private agencies and with each other. Additionally, it is the purpose of this Part to authorize municipalities to accept assistance from State and federal agencies and from other sources.

N.C. Gen. Stat. § 131E-7(a)(1) (1991):

> § 131E-7. General powers.
>
> (a) A municipality shall have all the powers necessary or convenient to carry out the

purposes of this Part, including the following powers, which are in addition to the powers granted elsewhere in this Part:

(1) To construct, equip, operate, and maintain hospital facilities;

N.C. Gen. Stat. § 131E-85(a) and (b) (1991):

§ 131E-85. Hospital privileges and procedures.

(a) The granting or denial of privileges to practice in hospitals to physicians licensed under Chapter 90 of the General Statutes, Article 1, dentists and podiatrists and the scope and delineation of such privileges shall be determined by the governing body of the hospital on a non-discriminatory basis. Such determinations shall be based upon the applicant's education, training, experience, demonstrated competence and ability, and judgment and character of the applicant, and the reasonable objectives and regulations of the hospital, including, but not limited to appropriate utilization of hospital facilities, in which privileges are sought. Nothing in this Part shall be deemed to mandate hospitals to grant or deny to any such individuals or others privileges to practice in hospitals, or to offer or provide any type of care.

(b) The procedures to be followed by a licensed hospital in considering applications of dentists and podiatrists for privileges to practice in such hospitals shall be similar to those applicable to applications of physicians licensed under Chapter 90 of the General Statutes, Article 1. Such procedures shall be available upon request.

N.C. Gen. Stat. § 131E-86 (1991):

§ 131E-86. Limited privileges.

(a) It shall be unlawful for an individual who is not licensed under Chapter 90 of the General Statutes, Article 1 [practice of medicine and surgery], to admit a patient to a hospital without written proof in accordance with the policy of the governing body of the hospital that a physician licensed under Chapter 90 of the General Statutes, Article 1, who is a member of the medical staff will be responsible for the performance of a basic medical appraisal and for the medical needs of the patient. The governing body of a hospital may waive this requirement for a dentist licensed under Chapter 90 of the General Statutes, Article 2, to the extent authorized by this statute, who has successfully completed a postgraduate program in oral and

maxillofacial surgery accredited by the American Dental Association.

(b) The governing body of each hospital shall not grant privileges that exceed the scope of a license.

N.C. Gen. Stat. § 90-153 (1991) [Chapter 90, Article 8]:

§ 90-153. Licensed chiropractors may practice in public hospitals.

A licensed chiropractor in this State may have access to and practice chiropractic in any hospital or sanitarium in this State that receives aid or support from the public, and shall have access to diagnostic X-ray records and laboratory records relating to the chiropractor's patient.

N.C. Gen. Stat. § 90-157.1 (1991):

§ 90-157.1. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed

chiropractor as the provider of care or services which are within the scope of practice of the profession of chiropractic as defined in this Chapter.

STATEMENT OF THE CASE

Petitioner, chiropractor R. Ernest Cohn, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, December 31, 1991, affirming an order of the United States District Court for the Western District of North Carolina granting summary judgment for defendants.

Petitioner's complaint charged that the denial of his application for hospital privileges at the Wilkes General Hospital, a municipal hospital in Wilkesboro, North Carolina, violated the federal antitrust laws.[1] The Fourth Circuit affirmed the District Court's ruling that the denial was immune from federal antitrust scrutiny under the Local Governments Antitrust Act of 1984, 15 U.S.C. § 84 *et seq.* (1985) ("LGAA") and the State Action doctrine. Petitioner now seeks a writ of certiorari to review that decision on the basis that it creates a conflict with rulings of other circuits.

---

[1] Petitioner also alleged related state law claims which are not at issue here.

The relevant facts may be summarized as follows.[2]

---

[2] Petitioner's Statement of the Case contains numerous inaccuracies. For example, Petitioner purports to dispute the hospital medical staff committee members' reasons for recommending that petitioner's hospital privileges application be denied, but in so doing, lists the reasons of the hospital Board of Trustees which considered a wide variety of factors in addition to the recommendation of the medical staff committees in making its decision to deny petitioner's privileges. (Pet. 6 n.5) Similarly, petitioner continually misrepresents that the individual physician medical staff committee members who are the respondents in this case are virtually all in "substantial, direct economic" competition with chiropractors and petitioner. (*See* Pet. i, 3, 5, 12, 18, 22) To the contrary, the respondents are physicians who practice in a variety of specialties -- the typical array of medical specialties found in a small town. The practices of these physicians no doubt vary in the extent to which they include patients who might also be treated by a chiropractor. However, at least some of the individuals, for example, Dr. Oliver, an ophthalmologist, no doubt have *no* competitive relationship with petitioner. A third example of inaccuracy in the petition is petitioner's repeated statement that the hospital made a *blanket* denial of privilege to *all* chiropractors, which it did not do. (Pet. 6, 21, 24) The medical staff committees and hospital Board of Trustees had before them, and made a decision concerning, petitioner's *individual* application. While consideration of that application necessarily involved general questions concerning chiropractors on medical staffs, the decision involved evaluation of petitioner and his potential service on the staff. There is evidence that many of the individuals considering

In 1984, petitioner applied for hospital privileges at the Wilkes General Hospital, a small, municipally owned and operated hospital in the city of Wilkesboro, North Carolina. In accordance with the hospital's by-laws, the application was referred first to the Medical Staff Credentials Committee, which recommended that the application be denied. The Committee stated that the privileges petitioner requested were not permitted under North Carolina law. The Committee further expressed concern that medical doctors would not be able to supervise chiropractic care at the hospital. Petitioner appealed the Credentials Committee recommendation to the Medical Executive Committee. The Executive Committee then considered the application "from the standpoint of whether or not it is in the best interest of the medical patients of Wilkes County and others using the hospital to add the chiropractor to the staff," noting that state law permits, but does not require, hospitals to grant hospital privileges to chiropractors. (Joint Appendix filed with Fourth Circuit ("JA") 108) After due consideration (and a personal meeting with petitioner), the Medical Executive Committee affirmed the Credentials

---

petitioner's application made their determination based on factors relating specifically to petitioner and might have decided differently regarding another chiropractor.

Committee's recommendation to deny petitioner's application. The Executive Committee was particularly concerned about petitioner's compliance with state law requirements that medical doctors co-admit all patients of non-physicians and remain responsible for their medical care.[3] Petitioner appealed this decision to the hospital's Board of Trustees before whom petitioner appeared personally.

After hearing petitioner and considering all other relevant material, including the medical staff committee recommendations required by the hospital by-laws, the Board denied petitioner's application. The Board stated its reasons for denying the application in a written resolution which explained that petitioner was the first chiropractor to apply for privileges at the hospital and that the Board had been unable to find any hospital in North Carolina that had a chiropractor on staff. "In view of the untried nature" of having

---

[3] This legal requirement was of particular concern because, in his appearance before the Medical Executive Committee, petitioner would not agree to the co-admission requirement. It has been stipulated on petitioner's behalf that under his application for privileges, no medical doctor would see a patient admitted "for chiropractic care." (JA 1654-55) While petitioner apparently now indicates a willingness to agree to this requirement, at the time his application was being considered he would not agree.

a chiropractor on staff, the Board was concerned about (1) increased malpractice liability and/or insurance premiums; (2) the staff's inability to identify, develop and implement a program of peer review for chiropractic services, which was required by both North Carolina law and Federal Medicare law; and (3) the Board's inability to monitor chiropractic fees and handle patients complaints about them (as it did for physician fees). Examining the need for petitioner's services at the hospital, the Board found that there did not appear to be any significant demand for chiropractic services at the hospital, and after petitioner's presentation, that there did not appear to be any valid reason why the treatment he rendered patients could not be rendered outside the hospital as well as in the hospital. Thus, as the Resolution related, the Board's "considered opinion" was that the application should be denied. (JA 23-24)

Subsequently, petitioner brought this lawsuit, alleging a violation of the federal antitrust laws. Petitioner named as defendants the hospital, the individual hospital trustees, and the individual physicians who were members of the medical staff committees making recommendations to the Board. Petitioner's Complaint acknowledged that it was the hospital *Board* that denied his privileges and that the Board did so for the reasons stated in its Resolution, but alleged various conspiracies

involving the medical staff committees, their members and the American Medical Association (an unnamed co-conspirator) to deny his privileges. Prior to the district court's decision, petitioner abandoned a number of these conspiracy theories and dropped the hospital as a defendant.[4] The district court granted summary judgment for the remaining defendants finding the privilege denial and committee recommendations were authorized actions of, or directed by, a municipality and thus immune from antitrust scrutiny under the Local Governments Antitrust Act of 1984, 15 U.S.C. § 34 *et seq.*, and State Action doctrine, first recognized in *Parker v. Brown*, 317 U.S. 341 (1943). The court expressly rejected petitioner's argument that immunity did not attach to the recommendations of the medical staff committee members because they were *private* physicians engaged in a *private* conspiracy. The court noted that all that was necessary for

---

[4] In his original and three amended complaints, petitioner has charged a conspiracy among the medical staff, between the medical staff and trustees (JA 19), between the medical staff and the AMA (JA 27) and between the hospital's Board of Trustees and the medical staff through its one overlapping member (JA 179-80). At this point, however, petitioner's *only* substantive claim is that the private M.D. physicians staff committee members combined or conspired to deny petitioner's privileges *through their recommendation* to the board.

immunity was a showing that the defendants acted in an official capacity or were directed by governmental officials, a showing clearly made in this case.[5] Motives, even personal gain motives, were irrelevant. In any event, the court noted that in this case there was no evidence of undue influence or improper persuasion by the physicians in their recommendations to the Board. (Pet. 17a)

Petitioner appealed this decision only as to the defendant medical staff committee members[6] and made plain that the only remaining theory is that the *recommendation* of these physicians was the product of a conspiracy. Petitioner argued that the defendants' recommendation to the Board was not covered by the State Action doctrine or LGAA because the Committee members were private individuals, not government officials.

---

[5] The "governmental officials" are the municipal hospital (acting through its Board of Directors). To the extent that the actions of the medical staff committee members were acts of "private parties," they were clearly directed by the hospital and Board.

[6] While petitioner's Parties to the Proceeding points out that one of the physicians, Dr. Bond, also served on the Wilkes Hospital Board of Trustees, it should be noted that Dr. Bond is included in this matter *only* as a physician medical staff member, not as a member of the Board of Trustees.

The Fourth Circuit affirmed the district court's grant of summary judgment, finding that the LGAA and State Action antitrust immunity applied not only to the denial of privileges by the Board, but also extended to the recommendations of physician committees made at the behest of the Board and therefore as agents of the hospital. Petitioner seeks review of that decision claiming that it creates a conflict with the rulings of other circuits.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The Fourth Circuit's decision directly follows this Court's decisions in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S. Ct. 1344 (1991), and is in harmony with other courts of appeals' decisions following those cases. The Fourth Circuit's decision affirming the lower court's grant of summary judgment is correct; and, in any event, does not fall within the narrow range of cases appropriate for consideration by this Court. Petitioner erroneously asserts that two aspects of the Fourth Circuit's decision create a "conflict in the circuits". The first is but an argument that the Fourth Circuit improperly and incorrectly interpreted North Carolina law, a subject clearly not appropriate for this Court's review on a writ of certiorari. In the second,

petitioner seeks to attack a "straw man" conspiracy holding not rendered by the court at all (and not necessary to its decision). Finally, even if there were a conflict in the circuits, this case is of limited importance.

II. THE DECISION BELOW DOES NOT CREATE A CONFLICT IN THE CIRCUITS

A. The Court's Holding that Respondents' Conduct Was Exempt from the Antitrust Laws under the State Action Doctrine Was Proper and Does Not Conflict with the Decisions of Other Circuits

Petitioner attempts to fashion a "conflict in the circuits" from the Fourth Circuit's holding that North Carolina state law provides the requisite basis for State Action immunity for municipal hospital privilege decisions concerning *chiropractors*, as well as those relating to *physicians*. Petitioner asserts that the Fourth Circuit's decision is in conflict with other circuits because it extends the State Action doctrine to immunize activities "expressly prohibited by state statute." (Pet. 14) It is plain that what petitioner is really complaining about is not a split in the circuits, but the Fourth Circuit's failure to embrace petitioner's argument about the proper interpretation of North Carolina law.

Petitioner argues that, while North Carolina law provides "clear articulation" of regulation and contemplates anticompetitive effects as to denials of hospital privilege applications for *physicians, dentists and podiatrists*, as to *chiropractors*, there is no North Carolina law providing "clear articulation." (Pet. 15) Petitioner argues that while North Carolina state policy is that hospitals must exercise care to admit only competent *physicians* who apply for hospital privileges, if a *chiropractor* applies, he or she must be admitted to the staff.[7] Thus, petitioner argues, there can be no State Action immunity for denial of a chiropractor's privileges, an act illegal under state law, and it creates a conflict with other circuits for the court to so find. But the Fourth Circuit did not find that state law prohibited denial of

---

[7] Petitioner asserts that "[T]he legislature . . . clothed public hospitals with broad discretion to grant or deny privileges to M.D.s, dentists, and podiatrists, but limited that authority through . . . N.C. Gen. Stat. §§ 90-153 & 90-157.1, expressly mandating access to public hospitals by chiropractors and their patients." (Pet. 15) Petitioner purports to argue that not *all* chiropractors must be admitted (Pet. 10) and that apparently *some* competency screening would be permitted, though, according to petitioner, none is specified in North Carolina law. However, if, as petitioner argues, at least one chiropractor *must* be admitted to each hospital, then, if only one applies, like petitioner at Wilkes Hospital in 1984, the hospital would be required to admit him to staff regardless of competence.

chiropractor hospital privileges, and it is the court's failure to so interpret North Carolina state law about which petitioner complains.

In accordance with its previous ruling in *Coastal Neuro-Psychiatric Associates v. Onslow Memorial Hosp.*, 795 F.2d 340, 341-42 (4th Cir. 1986), the Fourth Circuit ruled that North Carolina statutes authorize municipalities to construct, operate and maintain hospitals and require the hospital's governing body, its board of trustees, to decide who can practice there (taking into account specified criteria including the individual's competence and training and the needs and capabilities of the hospital). These statutes contemplate diminution of competition when privilege applications are denied by municipal hospital boards and provide State Action immunity for municipalities and their instrumentalities, as set forth by this Court in *Town of Hallie*, 471 U.S. at 40-42. This policy is long standing in the Fourth Circuit and is not challenged by petitioner. Rather, petitioner seeks to distinguish the instant case from *Coastal* and other municipal hospital cases because this case involves a chiropractor. According to petitioner, because the North Carolina statute setting forth the criteria on which hospital boards are to base their privilege decisions refers specifically to *physicians*, *dentists*, and *podiatrists*, and does not

mention *chiropractors*, the State did not "clearly articulate" such a regulatory scheme for chiropractors. This absence of specific reference to chiropractors, along with two other North Carolina "chiropractic" statutes, petitioner argues, make it *illegal* for a North Carolina hospital to deny hospital privileges to a chiropractor.

The Fourth Circuit rejected petitioner's argument that North Carolina law prohibited denial of hospital privileges to chiropractors when it ruled that State Action applied in this case. The Fourth Circuit's interpretation of North Carolina law is not an appropriate subject for this Court's consideration on writ of certiorari and use of its limited resources. As this Court has made plain, "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner v. United States,* 440 U.S. 48, 51 (1979) (footnote omitted).

Moreover, the Fourth Circuit's rejection of petitioner's proposed interpretation of North Carolina law was correct, and, in fact, the *only reasonable* interpretation of state law. Neither the absence of a specific reference to chiropractors in N.C. Gen. Stat. § 131E-85(a) nor anything in the two "chiropractic" statutes cited by petitioner

reflects a state policy requiring hospitals to grant hospital privileges to chiropractors.

While the statute does not specifically refer to chiropractors, the statute does refer to "others" and specifically states that"[n]othing in this [provision] should be deemed to mandate hospitals to grant or deny to any such individuals [physicians, dentists or podiatrists] *or others* privileges to practice in hospitals, or to offer or provide any type of care." N.C. Gen. Stat. § 131E-85(a) (emphasis added).[8] Far from reflecting a policy granting chiropractors greater rights than physicians to hospital privileges in North Carolina hospitals, the statute expresses a clear policy that hospital *boards of trustees* are to make hospital privilege decisions and that those decisions are required to be based on the qualifications of the applicant and the needs of the hospital. (Those criteria were duly applied with respect to petitioner's application.)

Moreover, neither "chiropractic" statute cited by petitioner prohibits a hospital from denying hospital privileges to a chiropractor. N.C. Gen. Stat. § 90-153 states that licensed chiropractors in North Carolina may have access to and practice chiropractic in public hospitals. Petitioner's

---

[8] This portion of the statute was omitted when petitioner quoted the provision in his petition. (Pet. 7-8)

suggestion that this statute *requires* hospitals to admit chiropractors to their staffs is directly contradicted by use of the permissive "may" in the statute.[9]

Similarly, the other statute cited by petitioner, N.C. Gen. Stat. § 90-157.1, which guarantees that patients who are recipients or beneficiaries of public programs are free to select chiropractors for appropriate services, does not require that hospitals admit chiropractors to their medical staffs. Nothing in the statute would so suggest, and the North Carolina Court of Appeals has specifically ruled that such freedom of choice statutes do not require hospitals to admit any practitioners or categories of practitioners to their medical staffs.

In *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 452-53, 293 S.E.2d 901, 924, *cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982), the North Carolina Court of Appeals specifically rejected the argument put forth by podiatrists that an essentially identical freedom of choice statute for podiatrists required

---

[9] The intentional use of the permissive "may" is emphasized by the legislature's use of the mandatory "shall" in the next clause of this statutory provision, which relates to chiropractors' access to x-ray and laboratory records concerning their patients. N.C. Gen. Stat. § 90-153.

a public hospital to grant hospital privileges to podiatrists. As the court pointed out, under North Carolina law, the right to enjoy hospital staff privileges is not absolute; it is subject to the standards set by the hospital's governing body, whose duty it is to establish such standards.[10] Freedom of choice statutes (which are typically applied to prohibit state reimbursement programs from refusing to reimburse certain types of practitioners for appropriate services) do not alter that fact. *Id.*

Neither statute, nor any other state policy, requires that hospitals admit chiropractors to medical staffs, much less that they give a *higher* priority to chiropractors than to physicians. Regardless of which North Carolina statute is looked to for the state's policy with respect to hospital privileges, the policy is inescapable that North Carolina empowers municipal hospital boards of trustees to make hospital privilege

---

[10] Not only does North Carolina law make plain that it is the duty of the hospital board of trustees to decide hospital privilege matters, but also the courts of North Carolina have emphasized that "no court should substitute its judgment for that of the hospital board" in making hospital privilege decisions. *Claycomb v. HCA-Raleigh Community Hosp.*, 76 N.C. App. 382, 384, 333 S.E.2d 333, 335 (1985), *rev. denied*, 315 N.C. 586, 341 S.E.2d 23 (1986); *Cameron*, 307 N.C. App. at 449, 293 S.E.2d at 922.

decisions and requires them to do so carefully, examining the capabilities of the applicants and the needs and requirements of the facility. This clearly articulated policy is in no way contradicted or diminished by the chiropractic statutes referenced by petitioner.

In essence, petitioner has sought to disguise a question of interpretation of state law as a conflict in the circuits. No such conflict exists, and the Fourth Circuit's decision is correct.

B. The Fourth Circuit's Conclusion that State Action Immunity for Municipal Hospital Privilege Decisions Extends to Recommendations Made by Medical Staff Committees that Are Delegated Responsibility for Making Such Recommendations Is Correct and Is Not in Conflict with Other Circuits

Petitioner argues that the Fourth Circuit's decision "radically extended" the intracorporate conspiracy doctrine by ruling that the committee recommendations of respondent physicians were made as agents of the municipal hospital and thus indistinguishable from the hospital for immunity purposes. (Pet. 18) Petitioner argues that this holding is a ruling that private independent physicians on a medical staff are incapable of conspiracy among themselves. The Fourth Circuit did not so find. Rather, its ruling was that the medical staff committee recommendations were authorized (and required) by the municipal hospital and therefore were acts of agents of the hospital, covered by immunity for acts of the municipality. To the extent that the Fourth Circuit's ruling interpreted conspiracy law at all,[11]

---

[11] The court did correctly note that "defendants' actions are shielded by operation of the Local Government Antitrust Act (LGAA), the State Action Doctrine *and intracorporate immunity*." (Pet. 4a, emphasis added) It is presumably this

it did not rule on the capacity for conspiracy among staff members (but rather conspiracy between the medical staff (or its committees) and the hospital) and such a determination was not necessary to the Court's finding of State Action immunity.

The Fourth Circuit explained that when considering whether actions of private individuals are immune under both LGAA and State Action immunity, the test is whether the actions are authorized or directed by a municipal official. (Pet. 7a-10a) The court then referenced its recent holding in *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 973 (1992), in which it determined that "when members of the medical staff recommend action in an application for privileges, as authorized by the municipal hospital, they are acting in their capacity as employees, as opposed to private parties." (Pet. 8a) The court went on to rule that "[p]hysicians who make peer review decisions at the behest of, or by delegation from, the hospital's board of trustees, are acting as agents of the hospital and are, therefore, indistinguishable from it." *Id.* Thus, State Action immunity covered the actions of the respondents

---

language which prompted petitioner's argument.

who had acted as authorized by staff bylaws and as agents of the municipal hospital.

The court explained that petitioner's argument that the medical staff's recommendation exerted "undue influence" on the Board of Trustees was not cognizable because the hospital was indistinguishable from its agents and cannot exert "undue influence on itself." (Pet. 10a) To the extent that this ruling relates to conspiracy law, it merely restates the *Oksanen* holding that there can be no conspiracy in a peer review setting between the hospital and those required to make recommendations to it.

But petitioner purports not to disagree with the Court's ruling insofar as it holds that the staff physicians are incapable of conspiring with the hospital. (Pet. 20, n.11) Instead, he identifies the issue as whether the committee members are capable of conspiring among themselves, an issue not necessary or relevant to the immunity ruling of the court. In *Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S. Ct. 1344, 1351 (1991), this Court made clear that there was no "conspiracy" exception to the State Action immunity for municipalities. Thus, authorized actions of a city council were immunized from antitrust scrutiny even if the individuals on the city council took action for their own selfish or corrupt motives at the request of private parties

seeking to further their own private interests. *Id.*[12] Under *Omni*, State Action would immunize a board of trustee decision and the recommendations of physicians even if those recommendations and decisions were made pursuant to a plan among the physicians to further their own interests (which is directly contrary to the evidence in this case), so long as the decisions were authorized actions of the board and those recommending.[13]

---

[12] In addition, this Court recognized that State Action immunity applied not only to the municipality itself (the city council), but also to those private parties who made recommendations regarding its decisions. *Id.*

[13] Petitioner's proposed "parade of horribles" is not to the contrary. (Pet. 23-24) Indeed, if a state statute appointed a municipal body to determine which stores could locate at a new shopping mall and required a "tenant's admission association" to make recommendations to the body, the actions of the municipal body and the tenant's association would appropriately be immunized from antitrust scrutiny under the State Action Doctrine. Similarly, State Action immunity would apply to the activities of a "landing rights committee" required by to make recommendations to a statutorily established municipal authority determining which airlines could land at an airport.

III. THIS CASE LACKS WIDESPREAD IMPORTANCE

Finally, petitioner argues that this Court should issue a writ of certiorari because the case involves "exclusion of chiropractors from hospital access." (Pet. 24) As noted *infra*, note 2, this case does not involve exclusion of a class of competitors, but rather one individual chiropractor. Thus, the case lacks the widespread importance claimed by petitioner.

CONCLUSION

For the reasons explained, the petition for a writ of certiorari should be denied.

Respectfully submitted,

*Roddey M. Ligon, Jr.
M. Elizabeth Gee
Womble Carlyle Sandridge & Rice
P.O. Drawer 84
Winston-Salem, NC 27102
(919) 721-3600

William Kearns Davis
James R. Fox
Bell Davis & Pitt
635 West Fourth Street
Winston-Salem, NC 27101
(919) 722-3700

W. Harold Mitchell
Mitchell, Blackwell & Mitchell
P.O. Drawer 69
Valdese, NC 28690
(704) 874-2271

*Counsel of Record

Attorneys for Respondents

June 12, 1992

MOTION FILED
JUN 11 1992

(3)

No. 91-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest COHN, D.C., D.A.B.C.O.,

Petitioner,

v.

John L. BOND, M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE ATTACHED BRIEF OF AMICUS CURIAE, THE AMERICAN CHIROPRACTIC ASSOCIATION, IN SUPPORT OF THE PETITION

GEORGE P. MCANDREWS
(Counsel of Record)
ROBERT C. RYAN
McANDREWS, HELD & MALLOY
500 West Madison Street
34th Floor
Chicago, Illinois 60661
(312) 707-8889

Counsel for Amicus Curiae

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

No. 91-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest COHN, D.C., D.A.B.C.O.,

Petitioner,

v.

John L. BOND, M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE ATTACHED BRIEF OF AMICUS CURIAE, THE AMERICAN CHIROPRACTIC ASSOCIATION, IN SUPPORT OF THE PETITION

Pursuant to Rule 37.4 of the Rules of this Court, the American Chiropractic Association ("ACA") moves for leave to file the following brief *amicus curiae* in support of present Petition for Writ of Certiorari. In support of this motion, the ACA states as follows:

1. As a national association of over 18,000 chiropractor members, the ACA is uniquely in the possession of facts and scientific research demonstrating the paramount importance of this case not just to its 18,000 chiropractor members and their millions of patients but to the entire nation as well.

2. As the ACA explains in the following brief, researchers have recognized that exclusionary conduct such as that presently before the Court (the exclusion of chiropractors from access to any hospital facilities) is the natural and intended result of national hospital accreditation standards promulgated by a medical-physician-dominated trade association (the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO")).

3. As the ACA also explains in its brief, the JCAHO standards, and their intended exclusions of competitors from hospitals, are widely recognized to be anticompetitive, to have nationwide impact, and to be a significant contributor to the healthcare cost crises facing the nation today.

4. The ACA also would like to present additional aspects of error in, and conflict among the circuits raised by, the decision in issue as brought to this Court by the Questions Presented.

The ACA thus requests leave to file the following brief in order to further demonstrate the importance of the Questions Presented to the entire nation and the need for this Court to grant this Petition.

Respectfully submitted,

GEORGE P. MCANDREWS
(Counsel of Record)
ROBERT C. RYAN
McANDREWS, HELD & MALLOY
500 West Madison Street
Chicago, Illinois 60661
(312) 707-8889

Counsel for Amicus Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
I.	
THIS CASE INVOLVES CRITICALLY IMPORTANT HEALTHCARE ISSUES THAT WERE TREATED UNACCEPTABLY BELOW	1
II.	
THE EXCLUSION AT ISSUE IS NATIONWIDE AND ANTICOMPETITIVE BY DESIGN	3
III.	
THE COURT BELOW IMPROPERLY FAILED TO EVEN ACKNOWLEDGE THE EXPRESS STATE POLICY OF CHIROPRACTORS' ACCESS TO PUBLIC HOSPITALS	9
IV.	
THE CIRCUIT COURTS' ATTEMPTS TO APPLY *COPPERWELD* IN THE HOSPITAL SETTING HAVE CREATED CONFUSED AND INCONSISTENT INTERPRETATIONS OF INTRACORPORATE IMMUNITY	11
A. The Circuits Differ In Applying The Economic Unity Standard Within The Hospital Setting	11
B. The Circuits Also Disagree As To The Validity And Application Of The Independent Personal Stake Exception	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases PAGE

Bhan v. NME Memorial Hosp., 669 F.Supp. 998 (E.D.Cal. 1987), *aff'd*, 929 F.2d 1404 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 617 (1991) 15 n.9

Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810 (11th Cir. 1990), *cert. denied*, 495 U.S. 924 (1990) 13 n.5

Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., 445 U.S. 97 (1980) 9

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 11, 14

Nanavati v. Burdette Tomlin Memorial Hosp., 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) 12 n.4

Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 406 (1991) 12 n.4, 14

Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991) 14 n.6, 15 n.8

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988) 13 n.5

Parker v. Brown, 317 U.S. 341 (1943) 9

Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 61 (1990) 12 n.3

Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313 (8th Cir. 1986) 14 n.6

Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48 (1985) 9

State of Arizona v. Maricopa County Medical Society, 643 F.2d 553 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982) 2, 6

Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985), *vacated*, 475 U.S. 1105 (1986), *original opinion reinstated*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988) 14 n.7

Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) 12 n.3, 13

Wilk v. AMA, 671 F.Supp. 1465 (N.D. Ill. 1987), *aff'd*, 895 F. 2d 352 (7th Cir. 1988), *cert. denied*, 111 U.S. 913 (1990) 3, 4, 5, 6

Statutes

N.C. Gen. Stats. §§ 90-153, 90-157.1 ..... 2, 3, 10 n.1

N.C. Gen. Stat. § 131E-85(a) (1989) 3, 10 n.2

Others

AHA Analysis of JCAHO Revised Medical Staff Standards 26 (Am. Hosp. Ass'n 1984) 6

Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. Pa. L. Rev. 431 (1988) 7, 8

Havighurst & King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective*, 9 Am. J. L. & Med. 263 (1983) 7

Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071 7

Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care in the Public Interest*, 24 B.C. L. Rev. 835 (1983) 8

Kissam, *Government Policy Toward Medical Accreditation and Certification: The Antitrust Laws and Other Procompetitive Strategies*, 1983 Wis. L. Rev. 1 7

Meade, M.D., *Low Back Pain of Mechanical Origin: Randomized Comparison of Chiropractic and Hospital Treatment*, 300 *British Med. J.* 1430 (1990) 2

Rial, M.D., *AMA News* (Dec. 16, 1983) 5

Shekelle *et al.*, *The Appropriateness of Spinal Manipulation and for Low-Back Pain, Project Overview and Literature Review* 7 (Rand Corp. 1991) 2

Speech of AMA Trustee to AMA Membership 4 (Am. Med. Ass'n 1983) 6

No. 91-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest COHN, D.C., D.A.B.C.O.,

Petitioner,

v.

John L. BOND, M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE, THE AMERICAN CHIROPRACTIC ASSOCIATION, IN SUPPORT OF THE PETITION

I.

THIS CASE INVOLVES CRITICALLY IMPORTANT HEALTHCARE ISSUES THAT WERE TREATED UNACCEPTABLY BELOW.

The health care industry currently does not display significant competitive conditions. There are many reasons for this situation, including the tax laws, the effects of insurance, and, as the majority notes, government regulation and financial entanglement. It is also undoubtedly true that a major factor has been the active suppression of competition by traditional medical associations. The restraints fostered by these groups are and should be subject to conventional antitrust scrutiny.

State of Arizona v. Maricopa County Medical Society, 643 F.2d 553, 565-66 (9th Cir. 1980) (Larson, J., dissenting; citations omitted), *rev'd*, 457 U.S. 332 (1982). This case presents this Court with the opportunity to resolve important conflicts among the circuits while subjecting to traditional antitrust scrutiny a medical-association-orchestrated conspiracy to exclude chiropractors and others—in this case in direct conflict with the express will of the North Carolina State legislature. N.C. Gen. Stats. §§ 90-153, 90-157.1.

This Court's review is essential, particularly in view of the voluminous classical research demonstrating that chiropractors are not only more effective but also more efficient in treating musculo-skeletal problems (primarily those of the lower back). As a study conducted *by medical doctors* in Britain concluded:

> Chiropractic treatment [of low back pain of mechanical origin] was more effective than hospital [i.e., medical doctor managed] outpatient management, mainly for patients with chronic or severe back pain. . . . The potential economic, resource, and policy implications of our results are extensive. . . . Our results suggest that there might be a reduction of some 290,000 days in sickness absence [in Britain] during two years, saving about $21,580,000 in output and $4,814,000 in social security payments. . . . There is, therefore, economic support for use of chiropractic in low back pain, though the obvious clinical improvement in pain and disability attributable to chiropractic treatment is in itself an adequate reason for considering use of chiropractic [in hospitals].

Meade, M.D., *Low Back Pain of Mechanical Origin: Randomized Comparison of Chiropractic and Hospital Treatment*, 300 *British Med. J.* 1430 (1990). There are other studies, many by medical doctors, to the same effect. *E.g.*, Shekelle *et al.*, *The Appropriateness of Spinal Manipula-*

tion and for Low-Back Pain, Project Overview and Literature Review 7 (Rand Corp. 1991) (the literature supports use of spinal manipulation (chiropractic) to relieve acute low back pain without neurological involvement).

At the same time, it is beyond debate that the enormous and growing healthcare sector in this country is uncompetitive and consuming inordinate resources. The Fourth Circuit's decision nevertheless looked to a single North Carolina statute (N.C. Gen. Stats. § 131E-85(a)) as authority for immunization of blatantly anticompetitive conduct in the healthcare sector without even acknowledging additional aspects of the same statute, and other North Carolina statutes (N.C. Gen. Stats. §§90-153, 90-157.1), expressly providing to the contrary. The Fourth Circuit's effective nullification of these North Carolina state statutes is a costly mistake with nationwide repercussions.

II.

THE EXCLUSION AT ISSUE IS NATIONWIDE AND ANTICOMPETITIVE BY DESIGN.

In the present case, the local hospital's "executive committee" decided to exclude competitive chiropractors from access to any hospital facilities whatsoever. This is no unique arrangement or result; it is by the careful design of the governing hospital accreditation standards of the "Joint Commission on Accreditation of Healthcare Organizations" (JCAHO).

Since in or before 1982, the hospital in issue has been accredited by JCAHO, formerly called the "Joint Commission on Accreditation of Hospitals" (JCAH). The "JCAHO" has long been owned by five medical organizations: the American Medical Association (AMA); the American Hospital Association (AHA); the American College of Surgeons (ACS); the American College of Physicians (ACP);

and the American Dental Association (ADS). *Wilk v. AMA*, 671 F.Supp. 1465, 1489 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1988), *cert. denied*, 111 U.S. 913 (1990). The JCAHO is governed by twenty-two commissioners appointed by their sponsoring organizations as follows: 7 by the AMA; 7 by the AHA; 3 by the ACP; 3 by the ACS; 1 by the ADA; and one other "public" member named by the other commissioners. *Id.*, 671 F.Supp. at 1489-90.

The JCAHO is thus a private trade association whose primary purpose is to promulgate and enforce standards for accreditation of hospitals. *Id.* JCAHO accreditation is "important to a hospital and loss of accreditation would be devastating." *Id.* It "can close a hospital." *Id.* JCAHO thus "has the power to define and regulate the activities which take place in hospitals and to eliminate or frustrate competition from non-medical physician health care providers." *Id.*

From in or before the 1960's until 1980, JCAHO interpreted its standards to require exclusion of chiropractors from any access to hospital facilities or personnel. *Id.* at 1490-91, 895 F.2d at 373. Following the AMA's lead, it was the JCAHO's widely published position that:

> The Commission looks on Doctors of Chiropractic as cultists. A hospital that encourages cultists to use its facilities in any way would very probably be severely criticized and lose its accreditation.

Id.

In 1970, at the request of the AMA, the JCAHO adopted the AMA's ethical standards ("Standard X"), which included a decades-old AMA ethics boycott of chiropractors. *Id.* "*[K]eeping chiropractors out of hospitals was one of the goals of the boycott.*" *Id.* JCAHO agents then repeatedly and consistently proceeded to advise hospitals "that

JCAH[O] would withdraw accreditation of a hospital that had chiropractors on its medical staff or that granted privileges to chiropractors." *Id.*

Four chiropractors brought the *Wilk* action against the AMA, the JCAHO, and a variety of other medical trade associations in 1976. *Id.* In response to the antitrust exposure, the JCAHO deleted Standard X four years later and proposed to its sponsoring associations that each hospital would be allowed to decide for itself whether to "credential" chiropractors, i.e., grant chiropractors access to hospital facilities. *Id.* The medical doctor membership of the sponsoring associations revolted and accused the AMA of failing to support its constituency—medical doctors. *Id.* The AMA then succumbed to this pressure and actively opposed the JCAHO proposal. *Id.*

The AMA then proposed a new standard requiring a hospital to have an "executive committee," the majority of which would have to be medical physicians and would be given sole authority to recommend and approve hospital credentialing for all healthcare providers within the hospital. *Id.* The JCAHO adopted this proposal, and the power of medical physicians to decide the competitive fate of chiropractors in hospitals was perpetuated. *Id.*

When the new standards were being adopted in 1983, the AMA announced to all AMA members:

> The JCAH must transfer the antitrust risk from the national level—where an adverse decision would apply to all hospitals—to the local level, and this is the way it should be done.

Rial, M.D., *AMA News* (Dec. 16, 1983).

> Let me [an AMA Trustee] assure you [the AMA membership] that we'll do all we possibly can to see to it that [the JCAHO standards provide that medical]

> physicians . . . both individually and collectively, as members of hospital medical staffs, will continue to be primarily responsible for [hospital] staff structure, credentials, privileges . . . ."

Speech of AMA Trustee to AMA membership, at 4 (1983).

The AHA later told its membership the same thing:

> [T]he revised standards also reflect a desire to keep ultimate control of the executive committee in the hands of the physician members of the medical staff.
>
> . . . .
>
> The revised standards also require that clinical privileges to admit patients be extended only to practitioners who are, or who become, members of the medical staff . . . .

AHA Analysis of JCAHO Revised Medical Staff Standards, pp. 26, 36 (1984).

The case before the Court involves exactly the type of medical physician exclusion of competitive healthcare providers that the JCAHO standards were designed to perpetuate. The JCAHO standards, which have long governed the hospital in issue, mandate that the hospital's credentialing decisions must be approved by the members of the medical-physician-dominated executive committee. *Wilk*, 895 F.2d at 374.

It is no surprise, therefore, that the Wilkes County Hospital executive committee voted to exclude competitive healthcare providers from all access to the hospital facility in which they would otherwise compete.

> Logic and common sense tell us that it is unreasonable to expect that a combination of medical providers might willingly take measures which could reduce their income and would require changes in the way they have traditionally conducted business.

Maricopa County, 643 F.2d at 568 (Larson, J., dissenting).

The commentators have nearly uniformly decried that this is the intended result of the JCAHO standards.

> JCAH standards decree an organized medical staff whose by-laws 'establish a framework for self-governance.' Notably the medical staff must have substantial authority over membership selection: it alone conducts the credentialing process that is the basis for determining admitting and treating privileges.

Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. Pa. L. Rev. 431, 529-30 (1988). It is in this manner that "Organized medicine's control over hospital privileges imposes the most direct limitation on non-physician practices." Kissam, *Government Policy Toward Medical Accreditation and Certification: The Antitrust Laws and Other Procompetitive Strategies*, 1983 Wis. L. Rev. 1, 9. *See also* Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1087, 1091 (the 1983 changes notwithstanding, the JCAHO standards remain the medical profession's vehicle of control over access to hospitals). As a result, "the consumer's 'free choice of physician,' so jealously guarded by professional interests through the years, has implied very little freedom to choose anything but a physician." Havighurst & King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective*, 9 Am. J. L. & Med. 263, 265, 268-69 (1983).

As the commentators have also frequently explained, this private arrangement is plainly anticompetitive and a likely contributor to the healthcare cost crises facing the nation today:

> [Medical] physicians, not institutions, control the vast bulk of health care expenditures. . . . Although difficult to quantify with precision, informed estimates

> place 70 to 90 percent of health care expenditures within the control of individual practitioners.
>
> . . . .
>
> Cost containment pressures will not relent until [medical] physicians have undergone a revolutionary change in behavior.
>
> . . . .
>
> For decades, physicians have enjoyed essentially unfettered control over both medical practice and its workplace. Physicians gained control of access to medical practice at the turn of the century through licensing laws and medical education requirements that created a self-perpetuating, state-sanctioned monopoly. During the following quarter of a century, the medical profession harnessed the hospital through accreditation standards that assured costless and unrestricted use of these capital intensive facilities essential to modern practice.
>
> . . . .
>
> The hospital industry, marked by a much greater degree of uniformity than other sectors of the economy, is particularly ripe for organizational innovation
>
> . . . .
>
> *The [medical] profession's grip on the internal organization of the hospitals must be broken in order for cost containment to succeed.*

Hall, 137 U. Pa. L. Rev. at 434, 445-46, 507 (emphasis added). *See also, e.g.*, Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care in the Public Interest*, 24 B.C. L. Rev. 835, 874, 876, 882, 909, 911, 923 (1983) ("JCAH[O] accreditation is a powerful tool for limiting competition against physicians in the hospital setting [and] may, by thus restraining competition, increase the cost of health care").

III.

THE COURT BELOW IMPROPERLY FAILED TO EVEN ACKNOWLEDGE THE EXPRESS STATE POLICY OF CHIROPRACTORS' ACCESS TO PUBLIC HOSPITALS.

The purpose of the state action doctrine is to shield activities directed by the state legislature from antitrust examination. *Parker v. Brown*, 317 U.S. 341, 350 (1943). The test of the state action doctrine is two pronged. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 105 (1980) (*quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)). The state action issue in this case centers around the first prong of this test, as the Fourth Circuit failed to adequately examine the state policy with regard to chiropractic access to hospitals.

Under the first prong, the criteria to determine the state's policy toward regulation of commerce is the state's intent to displace competition. *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 64 (1985). The state's intent can be found in statutes promulgated by the legislature. *See id.* at 64-65. If the State does not evince a clear intent to displace competition, then the state action exemption is not applicable. *Id.* at 64.

In this case, North Carolina's statutes not only fail to evince a clear intent to displace competition, but actually express a policy favoring competition. N.C. Gen. Stat.

§ 90-153 (1977)[1] clearly reflects the North Carolina legislature's intent to provide chiropractors full access to hospitals. Moreover, N.C. Gen. Stat. § 131E-85(a) (1989), in which the court below found an implicit displacement of chiropractic competition in hospitals, expressly provides that it does not "mandate" any such thing.[2] Thus, the repeatedly *stated* legislative intent of the North Carolina statutes favors the ability of chiropractors to have access to, and compete within, public hospitals. Any other interpretation nullifies the North Carolina state legislature's repeatedly expressed intent.

---

[1] N.C. Gen. Stat. § 90-153 provides:

Licensed chiropractors may practice in public hospitals

A licensed chiropractor in this State may have access to and practice chiropractic in any hospital or sanitarium in this State that receives aid or support from the public, and shall have access to diagnostic x-ray records and laboratory records relating to the chiropractor's patient.

[2] N.C. Gen. Stat. § 131E-85(a) provides:

The granting or denial of privileges to practice in hospitals to physicians licensed under Chapter 90 of the General Statutes, Article 1, dentists and podiatrists and the scope and delineation of such privileges shall be determined by the governing body of the hospital on a non-discriminatory basis. Such determinations shall be based upon the applicant's education, training, experience, demonstrated competence and ability, and judgment and character of the applicant, and the reasonable objectives and regulations of the hospital, including, but not limited to appropriate utilization of hospital facilities, in which privileges are sought. *Nothing in this Part shall be deemed to mandate hospitals to grant or deny to any such individuals or others privileges to practice in hospitals, or to offer or provide any type of care.* [Emphasis added.]

IV.

THE CIRCUIT COURTS' ATTEMPTS TO APPLY *COPPERWELD* IN THE HOSPITAL SETTING HAVE CREATED CONFUSED AND INCONSISTENT INTERPRETATIONS OF INTRACORPORATE IMMUNITY.

In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-773 (1984), this Court considered the intracorporate antitrust immunity for a parent corporation acting in concert with its wholly owned subsidiary. The circuit courts have subsequently attempted to apply the intracorporate immunity doctrine to the hospital setting, resulting in rampant confusion and inconsistent holdings among them.

A. The Circuits Differ In Applying The Economic Unity Standard Within The Hospital Setting.

This Court originally looked to the "economic unity" of the parent-subsidiary relationship as the basis of intracorporate immunity. The Court held that "the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Copperweld*, 467 U.S. at 772 n.18.

The lower courts, however, have inconsistently applied this definition of economic unity within the hospital setting. First, the courts below have applied different standards to determine when medical staff doctors conspire with each other (as opposed to conspiring with the hospital itself). In this regard, the courts have either:

(a) defined economic unity as *a lack of independent economic interests*, and since medical doctors are sepa-

rate economic entities with individual interests, they are never covered under the immunity doctrine;[3] or

(b) defined economic unity as *a lack of direct competition*, which can often provide independent medical doctors with immunity unless they directly compete with each other.[4]

Second, other lower courts have applied completely different standards to determine if and when a medical staff (as one unit) may conspire with the hospital itself (as a separate unit). Under these standards, the courts have either:

(a) defined economic unity as *a lack of independent economic interests* so that medical doctors as a group may conspire with a hospital when their goals are independent of the hospital's goals;[5] or

---

[3] "Any action taken by a medical staff satisfies the 'contract, combination or conspiracy' requirement." *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1033 (9th Cir. 1989), *cert. denied*, ____ U.S. ____, 111 S.Ct. 61 (1990) (*construing Weiss v. York Hosp.*, 745 F.2d 786, 814-817 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985)).

[4] When the staff as a group makes decisions or recommendations for the hospital in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital. However, when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised.

Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605, 614 (6th Cir. 1990), *cert. denied*, ____ U.S. ____, 112 S.Ct. 406 (1991). *See also Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 119 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

[5] Although the M.D. anesthesiologists may have been the agents of St. Peter's for some purposes, their interests were not as wed as the ties between a corporation and its officers or employees. . . . Those interests were sufficiently independent so

(Footnote continued on following page)

(b) defined economic unity as *a lack of competition* between the hospital and its medical doctors or staff, and since "the [medical] staff as an entity [has] no interest in competing with the hospital," the staff has been held to be legally incapable of conspiring with the hospital. *Weiss*, 745 F.2d at 817.

Amicus submits that the standard for immunity should be the same in a hospital setting as it is anywhere else: intracorporate immunity should only apply where the actors have identical economic interests, as they do within a corporation. This Court should adopt a rule that medical doctors may conspire with each other when they are in fact separate economic entities having disparate economic interests that lack economic unity. Similarly, a medical staff (or its members) may conspire with a hospital when the staff is comprised, as it usually is, of non-employee medical physicians with independent economic interests. Such a holding would advance the cause of reduction of anticompetitive behavior, particularly in the highly anticompetitive and oligopolized healthcare sector. In any event, this area is rife with important and costly conflicts of law that are ripe for review by this Court.

B. The Circuits Also Disagree As To The Validity And Application Of The Independent Personal Stake Exception.

This Court has noted, without comment, that there is an independent personal stake exception to the intracor-

---

[5] *continued*

that the collaborated conduct between the anesthesiologists and St. Peter's coalesced economic power previously directed at disparate goals.

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988). *See also Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990), *cert. denied*, 495 U.S. 924 (1990).

porate immunity doctrine: "[M]any courts have created an exception for corporate officers acting on their own behalf." *Copperweld*, 467 U.S. at 769 n.15.

The circuits disagree over this exception. In particular, the circuit courts do not agree on whether there exists an exception to intracorporate immunity for those who are acting on their own behalf within the hospital setting.

For example, the Sixth Circuit does not recognize any personal stake exception:

> We are not convinced that an agent acting with anti-competitive motives due to some independent personal stake raises sufficient antitrust concerns to warrant abandoning the traditional rule that a principal cannot conspire with one of its agents.

Nurse Midwifery, 918 F.2d at 615.

Of those circuits recognizing the exception, there is confusion over what constitutes an "independent personal stake." Some circuits require a "direct economic benefit" to satisfy the exception,[6] while others allow various indirect benefits, such as loyalty or goodwill.[7] Additionally, some circuits require that the independent personal stake play a dominant role in the decision-making proc-

---

[6] "We construe 'for the agents own benefit' to mean at least an economic stake in the gain to be realized from the anticompetitive object of the conspiracy." *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1318 (8th Cir. 1986). *See also Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 705 (4th Cir. 1991).

[7] "[T]heir personal motivation and stake was not monetary gain but the product of loyalty and allegiance . . . ." *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1496 n.22 (3d Cir. 1985), *vacated*, 475 U.S. 1105 (1986), *original opinion reinstated*, 823 F.2d 49, 50 n.2 (3d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988).

ess,[8] while others recognize mere subordinate participation as adequate.[9]

Amicus submits that these conflicts demonstrate the need for review of the Fourth Circuit's decision and announcement of a single standard from this Court.

CONCLUSION

Amicus thus requests that the Court allow the ACA's motion for leave to file its brief, grant the Petition for Writ of Certiorari, and review the important questions presented by the Petition.

Respectfully submitted,

GEORGE P. MCANDREWS
(Counsel of Record)
ROBERT C. RYAN
McANDREWS, HELD & MALLOY
500 West Madison Street
34th Floor
Chicago, Illinois 60661
(312) 707-8889

Counsel for Amicus Curiae

---

[8] If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis. *Oksanen*, 945 F.2d at 705.

[9] *See generally Bhan v. NME Memorial Hosp.*, 669 F.Supp. 998, 1016-1017 (E.D.Cal. 1987), *aff'd*, 929 F.2d 1404 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 617 (1991).

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

(4)

No. 91-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest **COHN**, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. **BOND**, M.D., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM FOR PETITIONER

BEVERLY C. MOORE, JR.
(Counsel of Record)
SANDRA B. BRANTLEY
Moore & Brown
4900 Massachusetts Ave., N.W.
Suite 230
Washington, D.C. 20016
(202) 364-1032

B. ERVIN BROWN, II
Moore & Brown
240 Branch Bank & Trust Bldg.
8 West Third Street
Winston-Salem, N. Carolina 27101
(919) 723-7966

Counsel for Petitioner

CASILLAS PRESS, 1717 K STREET, N.W., WASHINGTON, D.C. 20036

TABLE OF AUTHORITIES

Cases ***Page***

Cameron v. New Hanover Memorial Hospital, Inc., 293 S.E.2d 901 (N.C. App. 1982) 8

Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991) 9, 10

Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th Cir. 1991) 3

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 6

Statutes and Rules

N.C.G.S. § 90-153 ..... 5, 6, 7, 9

N.C.G.S. § 90-157.1 ..... 5, 6, 7, 9

N.C.G.S. § 90.202.12 8

N.C.G.S. § 131-126.11A 8

N.C.G.S. § 131E-85(a) 5, 6, 8, 9

N.C.G.S. § 131E-86(a) 2, 6, 7

N.C.G.S. § 131E-87 6

REPLY MEMORANDUM FOR PETITIONER

Respondents' Opposition Brief, filed June 12, 1992, proceeds through a series of misrepresentations to mischaracterize this case as one entirely different from that which the Fourth Circuit decided (which ironically it is, but for entirely different reasons).[1]

This Case Involves a Blanket Denial of Hospital Privileges to All Chiropractors. Respondents contend that this case lacks the "widespread importance" worthy of this Court's attention, because it "does not involve exclusion of a class of competitors, but rather one individual chiropractor." Opp. at 26. This contention does not pass the straight face test. It is belied by respondents' own description of the pretextual reasons given for the denial of petitioner's privileges application, each and every one of which would apply on its face to *any* chiropractor, not just to petitioner as an individual. Opp. at 8-10. *See also* Pet. at 6n.5.[2]

---

[1]These misrepresentations begin in the second sentence, wherein respondents purport to cite relevant statutory provisions "not identified by petitioner". Opp. at 2-6. Yet petitioner cited and described every one of those statutes, and quoted the texts of the three most important. Pet. at 5n.4, 7-11, 15, 17n.9.

[2]*E.g.*, the "problem" of "efficiently evaluating the services of a Chiropractor", given the "lack of complete understanding on the part of the medical personnel as to the treatment and services rendered by a Chiropractor". JA 22-24. Respondents assert that "[t]here is evidence that many of the individuals considering petitioner's application made their determination based on factors relating specifically to petitioner and might

(footnote continued on next page)

Indeed, the record shows that another local chiropractor, Dr. Richard Cohen, D.C., was warned not to bother to apply for privileges because, in petitioner's case, the Hospital had already decided not to admit chiropractors. JA 1546-1547.

The Record Established that Petitioner was in Direct Competition with Virtually All of the Private M.D.

(footnote continued from previous page)
have decided differently regarding another chiropractor." Opp. at 7-8n.2. However, respondents cite to no such "evidence" in the Fourth Circuit Joint Appendix ("JA"), for there is none relating to the private M.D.s.

Respondents imply that petitioner as an individual may have been unwilling to comply with the provisions of N.C.G.S. § 131E-86(a) (quoted in Opp. at 4-5), which requires that a co-admitting M.D. be responsible "for the medical needs" of a patient admitted by a non-M.D. The record also rejects this contention, as petitioner always stood ready to comply with state law—indeed, one of his applications was limited to whatever hospital privileges might be allowed by state law. JA 79. Respondents' only "support" for the proposition that petitioner would not agree to any M.D. co-admittance requirement was a statement made by counsel during a deposition that the co-admitting M.D. would not himself attend the patient "for chiropractic care". Opp. at 9n.3. This is exactly what § 131E-86(a) says. Obviously the co-admitting M.D., responsible only for the patient's *medical* needs, would not perform *chiropractic* treatments for which the M.D. is not licensed.

The "problem" of M.D. co-admission was not one raised by petitioner. This was merely a forecast of what would have happened had petitioner been *granted* hospital privileges. The private M.D. respondents would thereupon have prompted a *second* antitrust suit by engaging in a group boycott, by which no staff M.D. would agree to co-admit petitioner's chiropractic patients. Indeed, had summary judgment not been granted by the courts below on antitrust immunity grounds, petitioner might have developed evidence that the private M.D. respondents had threatened to boycott the entire Hospital were a chiropractor (petitioner) to be admitted.

Respondents. Respondents now contend that "petitioner continually misrepresents" that virtually all of the individual M.D. respondents were in direct competition with petitioner and other chiropractors. Opp. at 7n.2. Once again, it is respondents who "misrepresent". Their own deposition testimony confirms that virtually all of these M.D.s see patients with lower back pain and other musculoskeletal disorders that chiropractors treat. *E.g.*, JA 293-294, 425-426, 661-674, 807-808, 924-925. As for the one example respondents give of "an ophthalmologist", Dr. Oliver, who "no doubt [has] *no* competitive relationship with petitioner", petitioner explained that both chiropractors and ophthalmologists treat patients with severe headaches, many of which are *not* due to eye strain where (if that were the cause) the proper referral would be to an ophthalmologist, but otherwise a proper referral might be to a chiropractor. JA 669-670.

This point of course relates to the Fourth Circuit's "radical extension" of the intracorporate conspiracy doctrine, to apply not only where the private M.D. staff physicians do *not* compete with the excluded hospital privileges applicant, as in *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 709 (4th Cir. 1991), but also to situations where, as here, virtually all of the respondent M.D.s *do* compete with petitioner. Pet. at 18-23. This case squarely presents the exclusion of an entire "class of competitors", and respondents cannot make it otherwise by unilaterially asserting facts contradicted by the record.

Even more disingenuously, respondents contend that the Fourth Circuit did not even "rule on the capacity for conspiracy among staff members", but instead held only that there could be no conspiracy between the Hospital and its staff M.D.s. Opp. at 23. Yet the conspiracy *among* the private M.D.s themselves was the *only* conspiracy theory in the case by the time it reached the Fourth Circuit. The Hospital had long since been dropped as a defendant, and "the Trustees (Board) are not involved in this appeal." Pet. at 5a. Elsewhere respondents themselves acknowledge this. Opp. at 11 & 12n.6.

Respondents seek to finesse the intracorporate conspiracy issue by arguing that "such a determination was not necessary to the Court's finding of State Action immunity." Opp. at 23. But this means only that *if* the private M.D. defendants *were* acting as "agents" of the Hospital, *pursuant to a "clearly articulated state policy"* that actually authorized them to conspire in their "own interests" to exclude competitors (with Board approval), *then* the Fourth Circuit need not have reached its "radical extension" of the intracorporate conspiracy doctrine. Opp. at 25. Yet on the other hand, if the private M.D. respondents were *not* acting pursuant to a clearly articulated state policy, but were instead *violating* a pro-competitive state policy regarding chiropractor access to public hospitals, then this Court *would* have to reach and decide the intracorporate conspiracy issue as an alternative basis for the Fourth Circuit's decision. It is to that primary issue—state action immunity—that we now turn.

The Fourth Circuit Did Not Merely "MisInterpret", but Deliberately Ignored, the Applicable Pro-Competitive North Carolina Chiropractor Hospital Access Statutes. In arguments never made to the District Court or to the Fourth Circuit below, respondents for the first time in their Opposition to this Petition for Certiorari attempt an elaborate argument as to how N.C.G.S. § 131E-85(a), even though it expressly covers only M.D.s, dentists, and podiatrists in granting public hospitals broad discretion to deny privileges applications, somehow includes chiropractors within that ambit of discretion. Respondents now further contend that the separate Chiropractor Public Hospital Access Statutes (N.C.G.S. §§ 90-153 & 90-157.1), as to which respondents have been silent throughout this litigation, are somehow meaningless and irrelevant. Opp. at 14-21.

Respondents' new argument that this is merely a case where the Fourth Circuit at most misinterpreted certain North Carolina statutes is rather curious, because the Fourth Circuit in its antitrust immunity discussion did not even *mention* or address these Chiropractor Hospital Access statutes, much less attempt to explain their inapplicability. The "conflict among the Circuits" thus remains that the Fourth Circuit, unlike any other, has upheld antitrust immunity where the relevant "clearly articulated state policy" is *pro*-competitive, not foreseeably *anti*competitive as in

cases like *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40-42 (1985). Pet. at 14-17.[3]

In particular, respondents now focus on a clause in § 131E-85(a) providing that "[n]othing in this *Part* should be deemed to mandate hospitals to grant or deny to any such individuals [physicians, dentists or podiatrists] *or others* privileges to practice in hospitals, or to offer or provide any type of care." Opp. at 18 (emphasis added).[4] This "Part" means Part B ("Hospital Privileges") of Article 5 ("Hospital Licensure Act") of Chapter 131E ("Health Care Facilities and Services") of the North Carolina General Statutes. Part B in turn consists of §§ 131E-85, 131E-86, and 131E-87. This Part B does *not* include the Chiropractor Hospital Access Statutes, which are instead found in Article 8 ("Chiropractic") of Chapter 90 ("Medicine and Allied Professions").

Thus, it is immaterial that nothing in Part B of Chapter 131E requires public hospitals to grant or deny privileges to chiropractors, because that requirement is

---

[3]One option for this Court would be to remand with direction that the Fourth Circuit reconsider its antitrust immunity rulings in light of N.C.G.S. §§ 90-153 & 90-157.1. But the Fourth Circuit has already had that opportunity, both in the case in chief and in denying plaintiff's petition for rehearing (Pet. at 26a), which prominently featured the point that the Fourth Circuit had ignored the Chiropractor Access Statutes in its decision, and reiterated petitioner's fundamental reliance on these statutes as discussed at length in the prior briefs and at oral argument.

[4]In their quotation of the statute respondents substituted "[provision]" for "Part".

instead found elsewhere—in §§ 90-153 and 90-157.1. However, respondents now take issue with the proposition that those statutes establish a clearly articulated state policy against the blanket denial of chiropractor privileges by public hositals. Opp. at 18-21.

Section 90-157.1 declares that "[n]o ... municipality ... nor any board administering ... health service ... shall deny [patients] ... the freedom to choose a duly licensed chiropractor as the provider of care or services...." Respondents argue that this language "does not require that hospitals admit chiropractors to their medical staffs." Perhaps respondents' reference to "medical staffs" converts their argument into a mere semantical ploy, because petitioner never sought to be admitted as an M.D., but only as a chiropractor under § 90-153 ("[a] licensed chiropractor ... may have access to and practice chiropractic in any [public] hospital ... and shall have access to diagnostic x-ray records and laboratory records relating to the chiropractor's patient"),[5] subject to the M.D. co-admittance requirement of N.C.G.S. § 131E-86(a). The combination of § 90-153 and § 90-157.1 clearly creates a legislated right of access by chiropractors and their

---

[5]Petitioner's most substantial damages related to his exclusion not from *in*-patient but from *out*-patient privileges, which would include access to x-rays performed and read by the staff M.D. radiologist, and which implicates the "shall" portion of § 90-153. Pet. at 5-6n.4.

patients to public hospitals which the Fourth Circuit has now nullified.

Respondents argue against this straightforward construction of the plain language of the relevant state statutes by noting that in *Cameron v. New Hanover Memorial Hospital, Inc.*, 293 S.E.2d 901, 924 (N.C. App. 1982), a similar hospital patient access to *podiatrists* statute (N.C.G.S. § 90-202.12) was not so construed. It is easy to understand why. First, unlike chiropractors, podiatrists' hospital privileges are specifically and exclusively covered by § 131E-85(a), including the hospital board's broad discretion to grant or deny privileges. Article 12A ("Podiatrists") of Chapter 90 ("Medicine and Allied Occupations") does *not* contain a separate statute, similar to § 90-153, providing that podiatrists may practice in public hospitals. Perhaps more importantly, respondents do not mention that what *Cameron* involved, a dispute over the qualifications of certain podiatrists to perform foot surgery in a hospital, was governed by the specific provisions of another statute, N.C.G.S. § 131-126.11A. That statute, in language similar to § 131E-85(a), granted hospital boards broad discretion to grant, deny, or limit the privileges of "physicians and other [licensed] practitioners ... to practice surgery on human beings...." *Cameron*, 293 S.E.2d at 923.

At bottom, respondents' quarrel is with the North Carolina legislature whose pro-competitive and pro-chiropractor statutes, presumably enacted at the behest of chiropractors through the interplay of interest groups in the democratic process, respondents have

now succeeded in having judicially repealed. Respondents complain, for example, that petitioner's construction—that a patient "shall" have access to "a" (not any) chiropractor (§ 90-157.1), combined with a chiropractor "may" practice (§ 90-153), means that at least *some* duly licensed chiropractor must be afforded privileges at a public hospital—would in effect elevate the hospital access rights of chiropractors under these statutes above those of M.D.s under § 131E-85(a). Opp. at 14-16, 20-21. Shocking as this may seem to the medical establishment, this is exactly what the North Carolina Chiropractor Statutes have said since 1919, and in 1977 the legislature rejected an amendment that would have authorized hospitals to deny privileges to chiropractors. Pet. at 8, 10.

Omni Does Not Immunize Purely Private Antitrust Conspiracies by Persons Acting Contary to State Policy. Finally, respondents seek refuge in this Court's rejection of the " 'conspiracy' exception to the State Action immunity" in *Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1351 (1991). Opp. at 24-25. Petitioner does not, however, rely on the "conspiracy exception" involved in *Omni*—where the government body was itself a co-conspirator with the private parties. What is alleged here is a purely private conspiracy by the respondent M.D.s to concoct a pretextual rationale (which the M.D.s knew from past experience would be perfunctorily ratified by the Board, not a party to this appeal) for excluding a class

of their competitors from their hospital.[6] Notwithstanding this Court's reiteration in *Omni* that a state cannot create Sherman Act immunity by authorizing persons to violate it, 111 S. Ct. at 1353, respondents argue that under the statutory scheme these private M.D.s were perfectly free to conspire in their own interests to violate the antitrust laws. Opp. at 25. Under some *other* statutory scheme, perhaps, but not under *this* one.

CONCLUSION

For the foregoing reasons and those stated previously, the Petition should be granted.

Respectfully submitted,

B. ERVIN BROWN, II
Moore & Brown
240 Branch Bank & Trust Bldg.
8 West Third Street
Winston-Salem, N. Carolina 27101
(919) 723-7966

BEVERLY C. MOORE, JR.
(Counsel of Record)
SANDRA B. BRANTLEY
Moore & Brown
4900 Massachusetts Ave., N.W.
Suite 230
Washington, D.C. 20016
(202) 364-1032

June 22, 1992

Counsel for Petitioner

---

[6]Respondents contend that the staff M.D.s' adverse recommendation was not decisive, but that the Board "considered a wide variety of [additional] factors" in denying petitioner's privileges. Opp. at 7n.2. This assertion is again contradicted by the record. JA 441, 443-444, 469.

Supreme Court, U.S.
FILED
JUN 24 1992
OFFICE OF THE CLERK

No. 91-1813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R. Ernest COHN, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. BOND, M.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, AMERICAN CHIROPRACTIC ASSOCIATION

*Roddey M. Ligon, Jr.
M. Elizabeth Gee
Womble Carlyle Sandridge & Rice
P.O. Drawer 84
Winston-Salem, NC 27102
(919) 721-3600

William Kearns Davis
James R. Fox
Bell Davis & Pitt
635 W. Fourth Street
Winston-Salem, NC 27101
(919) 722-3700

W. Harold Mitchell
Mitchell, Blackwell & Mitchell
P.O. Drawer 69
Valdese, NC 28690
(704) 874-2271

*Counsel of Record

Attorneys for Respondents

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 2

ARGUMENT 2

THE PROPOSED BRIEF OF ACA DOES NOT BRING RELEVANT MATTER TO THE ATTENTION OF THE COURT 2

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Statutes and Rules:

Act to Amend Chapter 7272 of the Consolidated Statutes Relative to Public Hospitals, 1925 N.C. Sess. Laws c. 177 5

Local Governments Antitrust Act, 15 U.S.C. § 34 *et seq.* (1985) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1813

R. Ernest **COHN**, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. **BOND**, M.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, AMERICAN CHIROPRACTIC ASSOCIATION

Respondents respectfully submit that the Motion for Leave to File Brief of *Amicus Curiae*, American Chiropractic Association should be denied.

SUMMARY OF ARGUMENT

American Chiropractic Association ("ACA") failed to comply with the Rule 37 requirement that parties seeking to file an *amicus curiae* brief indicate any party who has refused consent to the filing. Respondents note that they did refuse consent to the filing of a brief by ACA. Such consent was refused because ACA does not possess facts or information that would help the Court resolve this matter. The proposed *amicus curiae* brief would not bring relevant matter to the Court's attention, and therefore the Motion for Leave to File should be denied.

ARGUMENT

THE PROPOSED BRIEF OF ACA DOES NOT BRING RELEVANT MATTER TO THE ATTENTION OF THE COURT

Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming an order of the United States District Court for the Western District of North Carolina granting summary judgment for respondents. The courts found that the hospital privilege decision that petitioner challenges is immune from federal antitrust scrutiny under the Local Governments

Antitrust Act, 15 U.S.C. § 84 *et seq.* (1985) ("LGAA") and the State Action doctrine. Petitioner argues that the district court and Fourth Circuit misinterpreted North Carolina law when they did not carve out an exception for *chiropractors* to the general rule in North Carolina that hospital privilege decisions must be made by hospital boards of trustees and must be based upon both the qualifications of the applicant and the needs of the hospital. Petitioner argues that it was error for the courts below to fail to construe North Carolina "freedom of choice" and chiropractic access statutes as *requiring* that hospitals grant privileges to chiropractors. Petitioner's position is that while North Carolina grants hospitals discretion to deny hospital privileges to *physicians* (when their qualifications or the needs of the hospitals so indicate), there is no such discretion when chiropractors apply for privileges. Thus, according to petitioner it is illegal in North Carolina to deny hospital privileges to a chiropractor. (Pet. 15) Petitioner argues that State Action cannot immunize illegal acts, and therefore it was error for the lower courts to find State Action immunity in this case.

ACA seeks to bring to this Court's attention information about (1) the importance of chiropractic services (Brief of *Amicus Curiae* ("Br.") 1-3); (2) assertions about the

anticompetitive nature of accreditation standards of the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") (Br. 3-8); (3) ACA's views on interpretation of North Carolina law (Br. 9-10); and (4) the views of ACA on conspiracy issues involving hospitals (Br. 11-15). None of the information proffered is relevant new information that would aid in consideration of the petition for writ of certiorari.

None of the information proffered by ACA in the first category concerning the importance of chiropractic services or the purported superiority of such services over physician services is relevant to whether State Action protects the hospital privilege decision being challenged in this case. The second category of information proffered by ACA, argument about the anticompetitive nature of accreditation standards of JCAHO and the importance of JCAHO accreditation to hospitals, is also irrelevant. Neither the JCAHO nor any of its sponsor organizations is a party to this lawsuit. Furthermore, the evil that ACA perceives with respect to JCAHO activities is expressly not relevant to this case. ACA argues that the JCAHO has encouraged physicians to obtain and maintain control of the credentialing process at hospitals and that physicians are likely to wish to exclude chiropractors from medical staffs. Any dangers there may be in hospital credentialing

systems where physicians control the process are irrelevant here. The record is without dispute that the Board of Trustees, *not* the physicians or medical staff, denied petitioner's hospital privileges (and that it did so after considering a number of relevant issues in addition to the recommendations of the medical staff committees required to comment on the application). (*See*, Complaint ¶ 17, Joint Appendix filed with Fourth Circuit ("JA") 18)[1]

The portion of the proposed *amicus curiae* brief that does deal with relevant subject matter, the proper interpretation of North Carolina law, does not bring any new information to the Court. ACA is a national organization that does not purport to have any insights concerning proper interpretation of North Carolina law, much less unique or different information warranting acceptance of an *amicus curiae* brief.

---

[1] We note further that North Carolina's requirement that hospital privilege decisions at a public hospital be made by the hospital board of trustees, not the medical staff, has been in effect since 1925, long before the JCAHO activities alleged by ACA. *See*, Act to Amend Chapter 7272 of the Consolidated Statutes Relative to Public Hospitals, 1925 N.C. Sess. Laws c. 177 (current version at N.C. Gen. Stat. § 131E-85 (Supp. 1991))

BEST AVAILABLE COPY

Finally, ACA seeks to draw the Court's attention to conspiracy issues relating to when, if ever, medical staff members can conspire among themselves and when, if ever, a medical staff can conspire with a hospital, issues not before this Court. The Fourth Circuit did not make any ruling concerning the capacity for conspiracy among medical staff members. The court's ruling related to a question of agency. The court held that when physician medical staff members make recommendations delegated to them by a hospital board of trustees, they do so as agents of the hospital. This ruling is not necessarily an intracorporate conspiracy issue and is applicable regardless of whether the "agent" whose acts are under scrutiny is otherwise related to the principal.[2] The conspiracy issues that ACA wishes the Court to address are not raised by this case.

---

[2] Further, to the extent that the court's ruling can be seen as any type of conspiracy ruling, the relevant conspiracy issue relates to the potential for conspiracy between the medical staff or its members and the *hospital*, an issue the petitioner concedes is not before this Court. (Pet. 20 n.11)

CONCLUSION

For the reasons explained, the Motion for Leave to File Brief of *Amicus Curiae* should be denied.

Respectfully submitted,

*Roddey M. Ligon, Jr.
M. Elizabeth Gee
Womble Carlyle Sandridge & Rice
P.O. Drawer 84
Winston-Salem, NC 27102
(919) 721-3600

William Kearns Davis
James R. Fox
Bell Davis & Pitt
635 West Fourth Street
Winston-Salem, NC 27101
(919) 722-3700

W. Harold Mitchell
Mitchell, Blackwell & Mitchell
P.O. Drawer 69
Valdese, NC 28690
(704) 874-2271

*Counsel of Record

Attorneys for Respondents

June 23, 1992